Office Supreme Court, U. S.
FILED
JAN 2 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 52.

IDA A. VAN DYKE AND CLEVE W. VAN DYKE
APPELLANTS,

vs.

W. PAUL GEARY, AMOS W. COLE, AND FRANK A. JONES, MEMBERS OF THE CORPORATION COMMISSION OF THE STATE OF ARIZONA, ET AL.

BRIEF FOR APPELLANTS.

WILLIAM C. PRENTISS,
F. C. JACOBS,
Attorneys for Appellants.

J. D. MILANS & SONS, 707 EIGHTH STREET, N. W., WASHINGTON, D. C.

OUTLINE OF ARGUMENT.

Page

Statement 1

The Constitution of Arizona Limits the Jurisdiction of the Corporation Commission to control over Corporations 12

The Attempted Extension of the Jurisdiction of the Corporation Commission to control over Persons, cannot be Supported under Section 6 of Article XV of the Arizona Constitution. . . 19

The Public Service Corporation Act, so far as it undertakes to extend the Jurisdiction of the Corporation Commission to persons, is Violative of Section 13 of Part 2 of Article IV of the Arizona Constitution, in that the subject of Control over Individuals is not expressed in the Title of that Act 21

The Action of the Corporation Commission was confiscatory in that the value of the Water Right, the Value of the Water, the Value of the Land forming the Sand Basin and immediate Water Shed, the Value of the Strips of Land occupied by the Pipe Lines or of the use of such Strips for the purpose, or the Value of other substantial items, was not allowed in the Valuation of the System. 26

Mrs. Van Dyke's Water Business is of such Private and Non-Public Nature as that attempted Governmental Rate-fixing, even if sanctioned by the State Constitution, would be Violative of the Federal Constitution 66

Statutes Cited.

Page

Arizona Constitution.

Article II., Sec. 3 4
Sec. 4 .....4, 89
Sec. 8. 4
Sec. 10 5
Sec. 17. 5
Sec. 25 5
Sec. 32 .....5, 89
Article IV., Part 2, Sec. 13.....5, 21-23
Article XIV. in full .....Appendix
Article XIV., Sec. 1.....3, 13, 14, 16
Sec. 2. .....3, 16
Sec. 7. 18
Sec. 16 .....3, 14, 15, 16
Article XV. in full .....Appendix
Article XV. Sec. 1. .....3, 16
Sec. 2. .....3, 13, 14, 15, 16
Sec. 3. .....4, 12
Sec. 6. .....17, 19
Article XVII., Sec. 2. 87
Arizona Act 90, Sec. 2 (w)..... 6
Sec. 2 (x) 6, 17, 22
Sec. 2 (z) 6, 16, 22

California Constitution.

Article XII., Sec. 23.....7, 15
Federal Judicial Code, Sec. 266..... 11

Cases Cited.

	Page
Bohmer v. Haffner, 55 N. E. 1047	25
Buckner Irr. M. & I. Co. v. Farmers Ind. D. Co., 72 Pac. 49	59
Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715	75
Del Mar Light & Power Co. v. Eshleman, 140 Pac. 591	80
German Alliance Ins Co., v. Lewis, 233 U. S., 389	66-68, 69
Golden Star Fraternity v. Martin, 35 Atl. 908	24
Howard v. Perrin, 76 Pac. 400, 200 U. S. 71	26, 58
Inhabitants of Montclair v. Ramsdell, 107 U. S. 147	24
In re Mansfield, 22 Penna Superior Ct., 224	24
In re San Gabriel Valley Water Co., Public Utilities Repts., 1916 B, 895	26, 60
Kansas v. Colorado, 206 U. S., 46	59
Kendall v. U. S., 12 Pet. 524	20
Lindsley v. National Carbonic Gas Co., 220 U. S., 60	28
Palermo Land & Water Co. v. Railroad Commission, 160 Pac. 228	83
Palmer v. Railroad Commission, 138 Pac., 997	86
Pipe Line Cases, 234 U. S., 548	68-75, 88, 90
Ryan v. Quinlan, 124 Pac. 512	59
San Joaquin & K. R. C. & I. Co. v. Stanilaus County, 233 U. S., 459	26, 65, 87
Schenck v. State, 37 Atl. 724	24
Spring Valley Water Works v. Schottler, 110 U. S., 347	67

Page

Thayer v. California Development Co., 164 Cal. 117, 128 Pac. 21 76
Tullis v. Lake Erie Western R. Co., 175 U. S., 348. 16
Water Co. of Tonopah v. Public Service Commismission (Morrow, J.), unreported 26

Text Writers.

1 Wiel Water Rights in the Western States, 3rd ed., Secs. 33, 35 88
Secs. 364, 365 57
Sec. 690. 88
2 Wiel Water Rights in the Western States, 3rd ed., Sec. 1039 28
Secs. 1041, et seq 61
Sec. 1066 28
Secs. 1077, et seq 58
Secs. 1100, et seq 61

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 52.

IDA A. VAN DYKE AND CLEVE W. VAN DYKE
APPELLANTS,

vs.

W. PAUL GEARY, AMOS W. COLE, AND FRANK A. JONES, MEMBERS OF THE CORPORATION COMMISSION OF THE STATE OF ARIZONA, ET AL.

BRIEF FOR APPELLANTS.

STATEMENT.

The fundamental, though not the only, question presented is whether or not the Corporation Commission of the State of Arizona had jurisdiction over the appellant Ida A. Van Dyke, individual owner of a water system established by her for the purpose of furnishing water only to purchasers of lots from the Miami Townsite Company, of which she is the principal owner. The appellant Cleve W. Van Dyke is the manager of the water system.

In 1909, prior to the admission of Arizona as a State, the appellants organized the Miami Townsite Company to handle a tract of land which they had acquired for townsite purposes. In order to facilitate development and sale of lots, the appellant Ida A. Van Dyke, in her capacity as an individual, established, wholly upon land owned by her, the water system in question for the purpose of conveying water from what was known as the Granite Springs and furnishing the same to purchasers of lots in said town for domestic, commercial and fire protection uses. As gradually developed and extended, the water system embraces wells, pumping machinery, storage tanks, conduits, service pipes, etc. Rates of charges for water were established and accepted and paid by purchasers and owners of lots, who were required to enter into written contracts for water service.

With the growth of the town the income of the water system had increased until in or about the year 1913 the gross annual income was $28,832.65 and the net income $9,511.49, as figured by the accountant of the water system (Record, p. 88).

On November 28, 1911, Arizona was admitted as a State and its Constitution, which took effect on that date, by Article XIV, provided a basic law governing corporations, and, by Article XV, created a Corporation Commission. As one branch of the fundamental question presented involves the effect of these Articles of the Constitution, we print them in full as an appendix hereto. The immediately pertinent provisions are as follows:

Article XIV.

Section 1. The term "corporation," as used in this article, shall be construed to include all associations and joint-stock companies having any powers or privileges of corporations not possessed by individuals or co-partnerships, and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons.

Section 2. Corporations may be formed under general laws, but shall not be created by special acts. Laws relating to corporations may be altered, amended, or repealed at any time, and all corporations doing business in this State may, as to such business, be regulated, limited, and restrained by law.

Section 16. The records, books, and files of all *public service corporations*, State banks, building and loan associations, trust, insurance, and guaranty companies shall be at all times liable and subject to the full visitorial and inquisitorial powers of the State, notwithstanding the immunities and privileges secured in the declaration of rights of this constitution to persons, inhabitants, and citizens of this State.

Article XV.

Section 1. *A corporation commission is hereby created* to be composed of three persons, etc.

Section 2. All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit,

hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers shall be deemed public-service corporations.

Section 3. The *corporation commission* shall have full power to and shall prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by *public-service corporations* within the State for service rendered therein, and make reasonable rules, regulations, and orders by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such *corporations* in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health of the employees and patrons of such corporations: * * *

The immunities and privileges secured by the declaration of rights referred to in Article XIV, Sec. 16, are found in Article II, and so far as appear to be in any wise pertinent, are, as follows:

Section 3. The Constitution of the United States is the supreme law of the land.

Section 4. No persons shall be deprived of life, liberty, or property without due process of law.

Section 8. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Section 10. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Section 17. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the us of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Section 25. No bill of attainder, ex post facto law, or law impairing the obligation of a contract shall ever be enacted.

Section 32. The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise.

Aricle IV, Part II, Sec. 13, provided:

Every act shall embrace but one subject and matters properly connected therewith,

> which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

The first legislature of the new State passed what is known as the Arizona Public Service Corporation Act, designated Chapter 90 and entitled "An Act relating to Public Service Corporations, Providing for the Regulation of the Same, Fixing penalties for the Violation Thereof, and Repealing Certain Acts, With an Emergency Clause." This act among other things contained the following provisions (Sec. 2):

> (w) The term "Water system," when used in this Act, includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures, and appliances, and all other real estate, fixtures, and personal property, owned, controlled, operated or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement, or water for power, fire protection, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use.
>
> (x) The term "Water corporation," when used in this Act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system for compensation within this State.
>
> (z) The term "Public service corporation,"

> when used in this Act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, and warehouseman, as these terms are defined in this section, and each thereof is hereby declared to be a public service corporation and to be subject to the jurisdiction, control, and regulation of the Commission and to the provisions of this Act.

The Act also contained provisions imposing drastic penalties for failure or refusal to comply with orders of the Commission, which, by the court below, were held to be unconstitutional. See opinion, Record, pages 109-114.

The Act in question was in large measure taken from the Public Utilities Act of California. The California act, however, in respect of subjecting individuals operating water or power utilities to control by the public utilities (railroad) commission, was sanctioned by specific and plenary constitutional authority contained in Section 23 of Article XII of the California Constitution, which provided:

> "Every private corporation, *and every individual* or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant or equipment, or any part of such railroad, canal, pipe line, plant or equipment within this State, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the

> production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the railroad commission as may be provided by the legislature, and every class of private corporations, *individuals*, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation, * * * and the right of the Legislature to confer power upon the railroad commission of public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

As stated, we contend that the jurisdiction of the Arizona Commission is limited by the Arizona Constitution to the control of *Corporations*. We also contend, with equal conviction, that said Arizona Act 90, in so far as it undertakes to extend the control of the Commission to individuals, is violative of Article IV, Part 2, Section 13 of the Arizona Constitution (supra) in that such purpose is not expressed in the title and is such a radical invasion of individual rights as not to be reasonably regarded as properly connected with the control of corporations. And we also contend that Mrs. Van Dyke's water system is of such private and non-public character as not to be subject to governmental rate-fixing.

On October 17, 1913, the Arizona Corporation Commission, proceeding upon the assumption that

Act 90, *supra*, invested it with jurisdiction in the premises, upon its own motion filed before itself a complaint against Granite Springs Water Company, Incorporated, C. W. Van Dyke and Ida A. Van Dyke, as respondents, alleging that the respondents were the owners of a water corporation situate in the town of Miami and were doing business as a public service corporation in distributing, delivering and selling water for domestic, commercial and fire use in said town of Miami, and that their rates and charges were excessive, unreasonable and unjust (Ex. A, Record, p. 19).

The appellants Cleve W. Van Dyke and Ida A. Van Dyke appeared and filed a plea to the jurisdiction of the Commission setting up that they were not the owners of a water corporation termed the Granite Springs Water Co., Inc., nor any water corporation whatsoever, and that they were not acting as a corporation under the laws of Arizona, or any other State, or at all; that the jurisdiction of the Commission was limited to control and supervision of corporations; and that Act 90 of the first legislature was void in so far as it undertook to extend the jurisdiction of the Commission to persons.

This plea was over-ruled by the Commission which thereupon proceeded, after notice, to an investigation of the Van Dyke water system.

The appellants, standing upon their plea to the jurisdiction, through counsel cross-examined witnesses produced by the Commission, but offered no evidence before the Commission.

On May 1, 1916, the Commission filed a report (Ex. C, Record, p. 23), wherein the value of the

plant for rate-making purpose was fixed at $40,105 (Record, pp. 29, 30), the amount of allowable annual expenditures placed at $8,920.12 (Record, p. 35), and a schedule of reduced rates prescribed, figured so as to yield a net return of 10 per cent (or $4,-010.50) upon the valuation for rate-making purposes (Record, pp. 34, 39). By order No. 8 (Record, p. 40), the Commission undertook to cancel and annul all service contracts then existing between the appellants and consumers for water service not in conformity, in respect of rates, with the provisions of the order of the Commission.

Thereupon the appellants filed a motion for rehearing (Ex. D, Record, p. 40), wherein the objections to the jurisdiction of the Commission were renewed and exception was taken to the order cancelling pre-existing contracts as impairing the obligation of contracts, and, in detail, to the various findings and rulings of the Commission and its failure, in valuing the plant, to make allowance for certain substantial items to which reference will be made herein.

The motion for rehearing was denied and thereupon the petitioners filed an application for suspension of the order to enable them to apply to the proper State court for a review of said order and for injunction restraining the Commission from proceeding further for want of jurisdiction. This application was also denied (Ex. E, Record, p. 47).

Thereupon the appellants filed in the United States District Court for the District of Arizona, the Bill of Complaint herein, seeking injunction against the members of the Commission, the Attor-

ney-General of Arizona and the County Attorney of Gila County, to restrain them from attempting to enforce the conditions of the order of the Commission, or instituting, authorizing, or directing the institution of any suits against the appellants for the recovery of any penalties under the provisions of said Act 90, and a decree declaring the order of the Commission to be unreasonable, unfair and unjust, and void as in contravention of the Constitution of the United States and the Constitution of Arizona. See amended Bill of Complaint, Record, p. 1.

In support of their application for injunction *pendente lite,* the plaintiffs filed affidavits (Record, pp. 52-57).

The defendants filed a motion to dismiss (Record, p. 50) and counter affidavits (Record, pp. 92-101), and the plaintiffs filed further affidavits in reply (Record, pp. 58-91).

Pursuant to Sec. 266 of the Judicial Code, the application for injunction pendente lite, was heard before a Circuit Judge and two District Judges, who, pursuant to an opinion filed in the case (Record, p. 105), entered an order (Record, p. 102) restraining the defendants from attempting to enforce the penalties provided by the Public Service Corporation Act, but denying the application for injunction restraining the defendants from enforcing the conditions of the order of the Corporation Commission fixing rates to be charged by the complainants.

The case is here on appeal from that order, under Section 266 of the Judicial Code, and presents the question of whether the Public Service Corporation

Act, in extending the jurisdiction of the Corporation Commission to individuals, or if applicable to Mrs. Van Dyke, is unconstitutional, and, in the alternative, the question of whether the rates fixed by the Corporation Commission are confiscatory because of the failure of the Commission, in valuing the plant, to make allowance for the substantial items before mentioned.

ARGUMENT.

The Constitution of Arizona Limits the Jurisdiction of the Corporation Commission to Control Over Corporations.

The jurisdiction of the Corporation Commission is prescribed by Section 3 of Article XV:

> "The Corporation Commission shall have full power to and shall prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by *public service corporations* within the State for service rendered therein, and make reasonable rules, regulations, and orders by which such *corporations* shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such *corporations* in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health of the employees and patrons of such corporations * * *"

Section 2 of Article XV defines "public service corporations:"

> "All *corporations* other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all *corporations* other than municipal, operating as common carriers shall be deemed *public-service corporations.*"

The Appellees contended, and the Court below held, that the term "corporation" as used in the Sections quoted, must be construed to include *persons* as well as corporations.

But that construction is repelled and rendered impossible by the definition of "corporation" in Article XIV.

Section 1 of Article XIV provides:

> "The term '*corporation,*' as used in this article, shall be construed to include all *associations* and *joint-stock* companies having any powers or privileges of corporations *not possessed by Individuals or Co-partnerships,* and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons."

The appellees contended below that this definition, being expressly limited to the term "corpora-

tion'' as used in that Article (XIV), was not controlling of the use of the term ''corporation'' or ''public service corporation'' in Article XV; but that contention is rendered untenable by Section 16 of Article XIV, which provides:

> ''The records, books, and files of all *public service corporations*, State banks, building and loan associations, trust, insurance, and guaranty companies shall be at all times liable and subject to the full visitorial and inquisitorial powers of the State, notwithstanding the immunities and privileges secured in the declaration of rights of this constitution to persons, inhabitants, and citizens of this State.''

The term ''Public Service Corporations,'' as thus used in Section 16 of Article XIV, is by Section 1 of Article XIV necessarily limited in application to corporations proper, and it is unthinkable that, in the face of such specific definition, the framers of the Constitution could have intended the terms ''corporation'' and ''public service corporation'' in Section 2 of Article XV to embrace individuals.

Notwithstanding, the appellees contended below that the framers of the Constitution had in view the utility itself rather than the ownership thereof and intended to give the Corporation Commission control over all public utilities, and that, therefore, the terms ''corporation'' and ''public service corporation'' in Article XV must be extended to include an individual owner of a public utility.

But, if utilities owned by individuals had been in contemplation and intent, it would have

been easy to include persons within the definition of public service corporations in Section 2 of Article XV, which would have necessitated like modification of Section 16 of Article XIV.

On the other hand, that the framers of the Constitution used terms and definitions advisedly is apparent from Section 1 of Article XIV, where they were careful to extend the term "corporation" to include "*associations and joint-stock companies having any powers or privileges of corporations not possessed by individuals or co-partnerships.*"

The framers of the Constitution must be presumed to have had before them as precedents the Constitutions of other States, particularly the then recent new Constitution of the adjoining State of California, which in Section 23 of Article XII, after defining the term "Corporation" in the exact language of Section 1 of Article XIV of the Arizona Constitution, provided:

> "Every private corporation and every INDIVIDUAL operating, managing or controlling the plant * * * for the production, generation, delivery or furnishing of * * * water or power * * * either directly or indirectly to or for the public * * * is hereby declared to be a public utility subject to such control and regulation by the railroad commission as may be provided by the Legislature, and every class of private corporations, INDIVIDUALS, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation * * * and the right of the Legislature to confer power upon the rail-

road commission of public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

It is obvious that the framers of the Arizona Constitution advisedly phrased Sections 1 and 16 of Article XIV and Section 2 of Article XV, so as not to affect individuals, and that the governmental control vested in the Corporation Commission was, as indicated in Secs. 1 and 2 of Article XIV, based upon the general amenableness of corporations to control as a condition of the enjoyment by them of the "powers and privileges of corporations not possessed by individuals or partnerships," and to the "full visitorial and inquisitorial powers of the State" notwithstanding the immunities and privileges secured in the declaration of rights to persons (Article XIV, Sec. 16).

In the Court below the appellees relied upon some State cases holding that the term "railroad corporations" in State statutes imposing special liabilities or burdens upon railroad companies, should be construed to include individual owners of railroads in order to avoid the necessity of declaring such statutes unconstitutional; but this court has held that it is not necessary to the validity of such statutes that they should be construed to extend to individuals. Tullis vs. Lake Erie Western R. Co., 175 U. S., 348, 351, and cases cited.

In the Public Service Corporation Act, Chapter 90, supra, the first legislature provided, in Subdivision Z of Section 2, that the term "public service corporation," when used in that Chapter, should include every "water corporation," etc., "as these

terms are used in this Section, and each thereof is hereby declared to be a public service corporation and to be subject to the jurisdiction, control, and regulation of the Commission and the provisions of this chapter; and, in Subdivision X of the same Section, that the term "water corporation," when used in that chapter, should include every corporation or person, etc., owning, controlling, operating, or managing any water system for compensation.

It was contended by the appellees in the Court below, that the legislature thereby undertook to define the term "public service corporation" as used in the Constitution, and that such legislative construction is entitled to great weight and consideration. On the contrary, the inference is stronger that the legislature was attempting to extend the jurisdiction of the Commission to *persons* under assumed sanction of Section 6 of Article XV of the Constitution (see Appendix), as the appellees also contend.

The idea of definition excludes the idea of extension and *vice versa,* so that the appellees thus concede doubt as to which was the intent of the legislature and destroy their argument of legislative construction.

Needless to suggest, the Constitution controls and the legislature is without power to impair or change it by construction of terms. Legislative construction can be only an aid to interpretation and, even if intent to construe be clearly apparent, must be ignored if, as here, the language of the Constitution is plain.

The Court below, in its opinion, said (Record, p. 122):

> "It seems to us to be giving a very narrow and technical construction to the provisions of the Constitution and the statute to say that it would not include persons because such a definition is found in the statute but is absent from the Constitution. It would seem to render the Constitution ineffective and would to a great extent defeat the beneficial purposes of the statute and the practical ends which it is intended to accomplish."

This obviously begs the question.

The court further said (same page).

> "There would be no difficulty whatever in a corporation transferring its property to an individual and thus destroy the jurisdiction of the Corporation Commission. Such a construction would therefore result in defeating the statute entirely until the Constitution could be amended to conform to such a view."

This argument, raising the statute above the Constitution, also begs the question and, in any event, is destroyed by the Constitution, which guards against any such attempted evasion. Section 7 of Article XIV provides:

> "No corporation shall lease or alienate any franchise so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or of any of its privileges."

The Attempted Extension of the Jurisdiction of the Corporation Commission to Control Over Persons, Cannot be Supported Under Section 6 of Article XV of the Arizona Constitution.

Section 6 of Article XV provides:

> "The lawmaking power may enlarge the powers and extend the duties of the corporation commission, * * *."

The argument of the appellees on this point necessarily concedes that the Constitution does not confer upon the Commission jurisdiction over persons, and resolves into the proposition that the framers of the Constitution, after defining and limiting the jurisdiction of the Commission to control over public service corporations (including associations and joint-stock companies having any powers or privileges of corporations *not possessed by individuals or co-partnerships*), then proceeded, by empowering the legislature to enlarge the powers and extend the duties of the Commission, to destroy that limit upon jurisdiction and give the legislature *carte blanche* in respect of the Commission.

The argument, carried to its logical conclusion, would result in vesting the legislature with authority to confer upon the Corporation Commission all executive and judicial functions not by the Constitution expressly conferred upon other specified governmental agencies. That being untenable, it becomes obvious that the grant of legislative power in Section 6 of Article XV must have rational bounds.

In the first place it must be construed so as not to collide with the express limitation of objects of jurisdiction and, in the second place, "powers" and "duties," as there used, obviously intend powers of control over, and duties in respect of, the specified objects of jurisdiction.

"Generally speaking," as said by Justice Thompson in Kendall vs. U. S., 12 Pet. 524, 622, "the word 'power' is used in reference to the means employed in carrying jurisdiction into execution;" and by Chief Justice Taney (p. 636), in speaking of the Acts of Congress establishing the judicial system of the United States, "the word 'powers' is employed to denote the process, the means, the modes of proceeding, which the courts are authorized to use in exercising their jurisdiction in the cases specially enumerated in the law as committed to their 'cognizance;' " and by Justice Barbour (p. 649):

> "It is thus apparent that Congress used the terms "jurisdiction," and 'powers,' as being of different import. The sections giving jurisdiction describe the subject matter, and the parties of which the courts may take cognizance; the sections giving powers, import authority to issue certain writs, and do certain acts incidentally becoming necessary in, and being auxiliary to, the exercise of their jurisdiction."

It is submitted, therefore, that Section 6 of Article XV cannot be construed to empower the legislature to extend the jurisdiction of the corporation commission to control over persons, but is merely a proper provision enabling the legislature to sup-

ply any incidental powers which, through the necessarily general nature of constitutional provisions, may not have been included in the other Sections of Article XV.

It is also to be remembered that the framers of the Arizona Constitution had before them the California Constitution which, as noticed, *supra,* specifically gave the California Railroad Commission jurisdiction over individuals operating public utilities.

But if Section 6 of Article XV could be construed to authorize the legislature to extend the jurisdiction of the Corporation Commission to persons,

The Public Service Corporation Act, so Far as it Undertakes to Extend the Jurisdiction of the Corporation Commission to Persons, is Violative of Section 13 of Part 2 of Article IV of the Arizona Constitution, in That the Subject of Control Over Individuals is not Expressed in the Title of That Act.

Section 13 of Part 2 of Article IV, of the Constitution of Arizona, provides:

> "Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an Act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

The title of the Public Service Corporation Act is

> "AN ACT relating to Public Service Corporations, Providing for the Regulation of the same, Fixing Penalties for the Violation Thereof, and Repealing Certain Acts; With an Emergency Clause."

The argument of the appellees in the Court below, necessarily conceding that the term "public service corporations," as used in the Constitution, did not embrace persons, was that, as the Act, in Subdivisions X and Z of Section 2, defined the term "public service corporations," as used in the Act, to include persons, such definition attached to the same term in the title, and that, therefore, the title did in fact express the subject of extending the jurisdiction of the Commission to persons. As such process (and result) would render nugatory any such constitutional provision, it may be dismissed without further notice.

The Court below, in its opinion, after saying that its ruling that the term "public service corporations," as used in the Constitution and in the statute, embraced persons, might be deemed a sufficient answer to the plaintiff's contention, merely asked the question "Does it (the Act) embrace more than 'one subject and matters properly connected therewith'?" and answered "We think not," citing authorities to the point that a constitutional requirement such as Section 13 of Part 2, Article IV, *supra*, should be construed liberally, and concluded:

> "While it is true that this Act contains a great number of detailed provisions, still we think that they are all germane to its general

> purpose, and that the manifest intent of the legislature and the construction of the words of the Act are in favor of the law; that the title of the Act embraces 'but one subject and matters properly connected therewith.'" (Record, p. 124.)

Apparently the Court below confused the question of the meaning of the term "public service corporation" in the Constitution with the question of whether or not the title of the Act violated Section 13 of Part 2 of Article IV of the Constitution, and failed to appreciate that the latter question arises only in case the term "public service corporations," as used in the Constitution, is held not to include individuals.

The question necessarily assumes that the Act of the legislature is attempted extension of the jurisdiction of the Commission to persons, and the point is whether the title, expressing as the subject the regulation of public service corporations, can reasonably be said to indicate that one of the purposes of the Act was such extension of jurisdiction.

As the framers of the Constitution did not see fit to give the corporation commission jurisdiction over persons, the members of the legislature and the publics generally who might be interested, could not from the title of the Act in question and through impression of that language upon the intellect, cognize that the proposed act, purporting to provide for the regulation of corporations, would go further and apply its provisions, and extend the jurisdiction of the Corporation Commission, to the control of persons.

In any event, as suggested before, the control of persons in the use of their individual property is such a radical invasion of individual rights as not to be regarded as reasonably connected with regulation of corporations as a condition of enjoyment of "powers and privileges of corporations not possessed by individuals or co-partnerships."

To use the language of Justice Harlan, in Inhabitants of Montclair vs. Ramsdell, 107 U. S. (17 Otto), 147, there are here grave objections and the conflict between the statute and the constitution is palpable.

Schenck vs. State (N. J.), 37 Atl., 724, is directly in point. There it was held that the title "An Act to provide for the regulation and incorporation of insurance companies," did not express as a subject of the legislation, the regulation of the business of *individual insurers.*

Golden Star Fraternity vs. Martin (N. J.), 35 Atl., 908, is also in point. There, an act entitled "An Act to incorporate benevolent and charitable institutions," was held invalid so far as it authorized contracts of ordinary life insurance to be made by such associations, as that subject was not expressed in the title.

See also In re Mansfield, 22 Penna. Superior Court, 224, where an act entitled "An Act to regulate the treatment and control of dependent, neglected and delinquent children under the age of sixteen years," which extended its provisions to children not included in such classification, was held invalid because the title contained no intimation that it was the purpose to deal with the treatment and control of all children.

Also Bohmer vs. Haffner (N. Y.), 55 N. E., 1047, where a section of an act applying to railroads was held violative of the Constitution because the subject of that section was not within the title of the act.

We submit that, for the reasons stated, the Corporation Commission was without jurisdiction over the defendant Ida A. Van Dyke, individual owner of the water system in question.

The further and underlying question is presented whether Mrs. Van Dyke's water business is of such private and non-public nature as that attempted governmental rate fixing, even if sanctioned by the State Constitution, would be violative of the Federal Constitution. Consideration of this question will be deferred until after the discussion under the following head, wherein it is more convenient to develop the facts.

But, even if it could be held that the Corporation Commission had jurisdiction in the premises, its proceedings and order are confiscatory and violative of the Federal Constitution, in that, in its valuation of the water system, it failed to make allowance for substantial items.

The Action of the Corporation Commission Was Confiscatory in That the Value of the Water Right, the Value of the Water, the Value of the Land Forming the Sand Basin and Immediate Water Shed, the value of the Strips of Land Occupied by the Pipe Lines or the Use of Such Strips for the Purpose, or the Value of Other Substantial Items, Was Not Allowed in the Valuation of the System.

If Mrs. Van Dyke, in obtaining and distributing water, is utilizing, as part of the water system, a valid water right by appropriation, which is property and has substantial value, and which has been omitted in the valuation of the water system, the order of the Commission is confiscatory. San Joaquin & K. R. C. & I. Company vs. Stanislaus County, 233 U. S., 459.

The same result follows if she is held not to have a valid water right by appropriation, for percolating and diffused underground water constituting a water supply is recognized as an element of value in the land itself (Howard vs. Perrin, 76 Pac., 400, 462; 200 U. S., 71, 75), which must be included in valuation of the plant for rate-making purposes. In re San Gabriel Valley Water Co. (Public Utilities Reports, 1916 B, 895, 906-911) quoting (pp. 910, 911) from opinion of Morrow, J., in Water Co. of Tonopah vs. Public Service Commission, August 13, 1913, as follows:

> "The water which it (the company) claims as a water right is percolating water running through its lands. I do not understand that

> percolating water passing under or through the soil is anywhere recognized as a water right, having a valuation separate and distinct from the land. It is not in any sense surface water. It is not water appropriated from running streams; nor is it water, the right to which is the same as that of a riparian owner. Percolating water is part and parcel of the soil, and it is as much a constituent element of the land as the mineral therein contained. Its value, if it has any, is therefore in the land, and cannot be separated from the land. It follows that in this case the value which the water has must be in the land. It may be that the complainant's development of water upon this land has given it a largely increased value, but if that is so, it appears to me that that should be the valuation of the land with its water content as a whole, and not as land with water right attached. This may not make a great diference in the result; but it will enable the Commission and the court to make a comparison with other land of like character and similarly situated."

In concluding, Judge Morrow says:

> "It seems to me that it would be difficult to establish an absolutely independent water value aside from the value of the land; but the value of the water with the land may be ascertained in the view of its available uses."

The difference in result is that, if Mrs. Van Dyke has a valid water right, she is entitled to divert and use the water, to the extent of her appropriation, without interference from the owners of other lands in or along the gulch in which the water flows and

accumulates in the sand basin tapped by the wells; if she has no water right, she takes the water as an incident of her ownership of the realty and, in respect of the amount of water pumped, might be subject to control by the courts at the suit of owners of other lands, if any, who might sink wells on their own land and complain that she was injuring them by exhausting the supply (2 Wiel, Water Rights in the Western States, 3d Ed., Sections 1039-1066) or by proper legislation sanctioned by the same principle (Lindsley vs. Natural Carbonic Gas Co., 220 U. S., 60).

The facts as set forth in the affidavits on behalf of the plaintiffs are as follows:

Affidavit of Cleve W. Van Dyke (*R., p.* 57):

> That I am familiar with the lands used and useful in connection with the said water system owned and operated by the said I. A. Van Dyke and forming a part thereof. That about two hundred and forty acres of land, a large portion of which forms a storage basin for water which flows from the mountains adjacent to Miami, together with the mountain slopes therefrom are used and useful and absolutely necessary as a part of said water system. That the said land is of great value, to-wit: about the sum of $38,400.00 and that the same was not considered by the Arizona Corporation Commission as a part of the water system of the said I. A. Van Dyke, and the value thereof was not considered or included by the said Arizona Corporation Commission as a part of the said water system

of the said I. A. Van Dyke and the value thereof was not considered or included by the said Arizona Corporation Commission in estimating the value of the said water system for the purpose of fixing the rates for the sale and distribution of water by the said I. A. Van Dyke, which said rates are set forth in Exhibit "C" attached to complainant's complaint herein.

That the said I. A. Van Dyke is the owner of a water right near the town of Miami, Gila County, Arizona, of the value of about $20,000, used and useful in connection with said water system and that the said water right and the value thereof was not considered or included by said commission as a part of said water system for the purpose of fixing rates prescribed by its order on the 1st day of May, 1914.

Affidavit of R. G. Thomas (*R., pp.* 59, 60, 61, 62):

That the land adjacent to said Miami Townsite, used and useful in connection with said I. A. Van Dyke water system and owned by the said I. A. Van Dyke, consists of 189.7 acres all lying in one body, and comprising a water basin for the collection and storage of water used by the I. A. Van Dyke water system, containing 60 acres in said basin and 129.7 acres of which land is used and useful in connection with said I. A. Van Dyke water system and owned by her, comprises a water shed, which water shed surrounds said water basin, beginning from level ground, rising back and constituting the said water shed; the water flows from this water shed into the water basin; the bottom of the basin is filled with sand; the water settles in this sand and

is held and stored there, which constitutes the water supply of I. A. Van Dyke water system.

* * * * * *

That a large portion of the land above mentioned comprising said water basin and said water shed is desirable land for residence purposes, and unless said land was owned and controlled by I. A. Van Dyke, the same would be settled upon by other parties, and residences would be erected thereon, and the same would be occupied by tenants, and the offal, refuse and excrement necessarily resulting from such occupancy and residence would be deposited upon said land and would contaminate the water flowing into said basin and used and distributed by the said I. A. Van Dyke through said water system; that in order to prevent the use of said land for such residence purposes, it is absolutely necessary that the land be owned and controlled by the said I. A. Van Dyke, and used by her in connection with said water system; that efforts have been made since said I. A. Van Dyke acquired said property, to establish a dumping ground for garbage and a cemetery thereon, and it was only by reason of the ownership and control of said land by the said I. A. Van Dyke and its use by her in connection with said water system that she was enabled to prevent the establishment of said garbage dump and cemetery thereon; that said Miami Townsite, and the territory adjacent thereto is situated and located in the heart of a desert country; that water is hard to find and difficult to develop,—a great deal of the water that is developed is not potable and unfit for drinking purposes. Some of the water, because of its coming in contact with minerals, is impregnated with minerals and some of it contains

a high percentage of sulphuric acid; that that portion of the property owned by I. A. Van Dyke, which constitutes the water basin and the water shed, produces a quantity of wholesome, potable water suitable for domestic uses; that said basin is the only water basin contiguous to the Miami Townsite where a sufficient quantity of potable water can be secured for domestic purposes in Miami Townsite; that because of this fact, its ownership and control is a necessary portion of the water system; that the land comprising said water basin and upon which said wells are situated, is of the value of $57,000.00; that the land comprising said water shed is of the value of $16,720.00, making a total valuation of $73,720.00.

* * * * * *

That I am familiar with a certain water right that is owned by I. A. Van Dyke; that I. A. Van Dyke has appropriated and claims perpetually 30,000 miners' inches, both surface and subterranean, and any and all other waters which flow over said water shed and into said water basin owned by I. A. Van Dyke, and all of the water of the streams and creeks which flow from the headwaters of the Pinal Mountains and all the tributaries and affluents of said streams; that said streams are supplied from live springs, melting snows and rains in the Pinal Mountains and on the water shed and constitute the supply of water that flows into the water basin; that the purpose and intention of appropriating said waters was to supply the consumers of the Miami Townsite with water; that the water basin receives its supply of water through the waters appropriated by I. A Van Dyke in this water right; that because of the desert

country, the scarcity of water and the difficulty of securing potable water in this country, it is necessary in order to maintain an adequate supply of water, that I. A. Van Dyke own this water right, the demand in this district for water being so great that if the ownership were vested in other persons, that it undoubtedly would be pumped and utilized in other ways; that there is a great demand for water in this district for the concentrating of low grade copper ores, there being one mill of 3,000 tons daily capacity, and one of 10,000 tons daily capacity in course of construction, which must be supplied with water for the concentration of ores. For this reason the territory within a reasonable distance from this district, which is water bearing, has been purchased and is owned by interests that need a supply of water in their business. This is one of the reasons why the ownership of the water basin, the water shed and the water rights are essential to the maintenance and continuance of the I. A. Van Dyke water system which supplies the residents of Miami Townsite with water. The value of said water right owned by I. A. Van Dyke is $20,000.00.

Affidavit of L. F. Fletcher (*R., pp.* 63, 64):

* * * that the land adjacent to Miami Townsite, used and useful in connection with said I. A. Van Dyke water system and owned by said I. A. Van Dyke, consists of 189.7 acres, all lying in one body, 60 acres of which comprises the water basin for the storage of water, and 129.7 acres of which land comprises a water shed surrounding said water basin; that a large portion of the land com-

prising said water shed and water basin is desirable land for residence purposes, and unless said land was owned and controlled by I. A. Van Dyke, the same would be settled upon by other parties and residences would be erected thereon and the same would be occupied by tenants and the offal, refuse and excrement necessarily resulting from said occupancy and residence, would be deposited upon said land and would contaminate the water flowing therefrom and into said basin and used and distributed by said I. A. Van Dyke through said water system; that in order to prevent the use of said land for such residence purposes it is absolutely necessary that said land be owned and controlled by the said I. A. Van Dyke, and used by her in connection with said system; that efforts have recently been made to establish a dumping ground for garbage and a cemetery thereon, and by reason of the ownership and control of said land by said I. A. Van Dyke, and its use by her in connection with said water system, she was enabled to and did prevent the establishment of said garbage dump and cemetery thereon; that the land comprising said water basin is of the value of $57,000.00; that the land comprising said water shed is of the value of $16,720.00, making the total value of $73,720.00; that I arrived at my estimate of said valuation and base the same upon the sale of real estate of the same or similar character in the vicinity of said land;

* * * * * *

That I am familiar with a certain water right owned by I. A. Van Dyke; that I. A. Van Dyke has appropriated and claims perpetually 30,000 miners' inches, both surface and subterranean, and any and all other waters

which flow over said water shed and into said water basin owned by I. A. Van Dyke, and all of the water of the streams and creeks which flow from the headwaters of the Pinal Mountains and all the tributaries and affluents of said streams; that said streams are supplied from live springs; melting snows and rains in the Pinal Mountains and on the water shed, and constitute the supply of water that flows into the water basin; that the ownership of said water right by said I. A. Van Dyke is absolutely necessary in connection with said water system in order to maintain an adequate supply of water therefor, and that without said water right the said I. A. Van Dyke could not control and acquire the water used in and through said system.

That the value of said water right is the sum of $20,000.00.

Affidavit of I. A. Van Dyke and Cleve W. Van Dyke (*R., pp.* 66-68):

* * * that in the year 1909 I caused to be organized the Miami Townsite Company, a corporation, which corporation was organized under the laws of Arizona, and said Miami Townsite Company acquired a tract of land for the purpose of establishing a town thereon; that said Miami Townsite Company caused said tract of land to be surveyed into lots, blocks, streets and alleys, and established a townsite business; that said land so acquired by said Miami Townsite Company is the same land upon which is now situated the Miami Townsite in Gila County, State of Arizona; that said land is situated in the heart of a desert country, and that in order to promote and develop a town thereon, it was

essential to have a water supply, and that in order to facilitate the establishment of said town, and to sell and dispose of lots and land therein and develop a town thereon, it became necessary to establish a water system to be operated in connection with said townsite business, and in furtherance thereof I. A. Van Dyke acquired a tract of land comprising 189.7 acres, of which said tract of land 129.7 acres constitutes a water shed and 60 acres of which constitutes a water basin. From this water basin a supply of water was secured through three wells which were constructed thereon. The said I. A. Van Dyke established a pumping plant, connected said wells with mains laid through and upon said lands, connected said mains with laterals, which in turn are connected with the property owned by purchasers of lots of land in said Miami Townsite, and thereby established the water system known as the I. A. Van Dyke water system, and since the acquirement thereof I. A. Van Dyke has been and now is operating said water system in connection with said townsite business and supplying the residents and inhabitants of said townsite with water; that said water system was established and has been operated and is now being operated solely and exclusively for the purpose of supplying the residents and inhabitants of said Miami Townsite with water, and not for the purpose of supplying persons outside of said townsite, or the public generally with water; that at all times since the establishment of said water system I. A. Van Dyke has refused to supply persons residing outside of the said Miami Townsite with water, except in two instances, as follows: On one occasion when the said I. A. Van Dyke purchased an addi-

tional piece of ground to be used as an addition to said Miami Townside from one John H. Davis, and as an inducement to the said John H. Davis to transfer said tract of land to I. A. Van Dyke, it was agreed that he should be supplied, and he has been supplied since said time, with water from said water system. A second instance is in the case of one J. P. Glass, who purchased real estate from the Miami Townsite Company, and in order to square up the piece of property that he purchased from the Miami Townsite Company, he purchased a portion of the Davis Tract from the said John H. Davis at about the same time that I. A. Van Dyke purchased a portion of the same tract from the said John H. Davis, and the water that Mr. Glass was securing on the Miami Townsite was extended by him for his use to the fractional piece of ground that was purchased by him from the said John H. Davis; that it was never intended that the water system thus established should be used to supply the general public outside of Miami Townsite with water, and it has always been stated by I. A. Van Dyke and has been understood in the community where the I. A. Van Dyke water system has been established and is in operation, that at no time would the I. A. Van Dyke water system supply water to others than those who are residing upon the Miami Townsite, and that as stated before herein, I. A. Van Dyke has expressly refused on many occasions to supply water to other townsite projects in the vicinity of the Miami Townsite; * * * that the land used and useful in connection with said water system, including strips of land in and upon which the main and lateral pipes are laid, is owned in fee simple by I. A. Van Dyke.

Affidavit of Cleve W. Van Dyke (*R., pp.* 68-69, 71):

> * * * that I am manager of the I. A. Van Dyke water system; that I have had charge of the organization, construction and operation of said system from its inception; that I have had nine years' experience in the construction and operation of water systems in Arizona. * * * In the Missippi Valley, on both the Eastern and Western coasts water is so plentiful that generally all that is needed is an equipment to pump the same from some river, stream or underground flow. Where conditions of this nature exist, the only essentials necessary to a water system is an equipment used in distributing the water, and for the pumping and storage of the same. In Arizona, however, outside of the agricultural valleys, a water distribution system is a vastly different problem. There the first and greatest expense incurred in the establishment of a water system in such localities as Miami, is securing an adequate supply of good wholesome water. In fact, no business man of sufficient business ability to organize, develop and conduct a water system successfully would consider a water enterprise involving a considerable amount of investment, without first arranging for a definite supply of water. This phase is usually found to be the most expense phase of water systems in the mountain towns of desert Arizona. One other phase that the experience of water distributors have found to be essential in mountain communities, is to care for the quality and kind of water to be provided their consumers. The necessity of securing and main-

taining a sanitary supply of wholesome water is primary.

* * * * * *

* * * that the said Engineer Ben Ferguson was supplied with a map showing the pipe line system and another map showing the water basin and water shed; that the methods of securing water were explained to him in detail; that the necessity of the ownership of the water basin and the water shed were explained to him in detail; that it was explained to Mr. Ferguson that it was necessary to own the water shed and water basin in order to furnish an adequate supply of water to the I. A. Van Dyke water system, that its ownership was further necessary in order to keep it sanitary so that the waters flowing into the wells of the I. A. Van Dyke water system would be uncontaminated. An effort was made to provide Mr. Ferguson with a valuation of the rights of way and the water basin and water shed, so that he might report these values to the Commission, but Mr. Ferguson refused to consider or accept such valuations, although they are a part of the water system used, useful and necessary in maintaining said water system.

Affidavit of T. J. Corcoran (*R., pp.* 72-74, 74-75):

* * * that the I. A. Van Dyke water system is located in the Miami Townsite, and is operated for the sole purpose of supplying water to the residents of the Miami Townsite; that the supply of water for the I. A. Van Dyke water system is drawn from four wells located in the water basin, sixty acres in extent; that this water basin is surrounded by a water shed containing 129.7 acres, which

constitutes the water shed; that the water basin and water shed are owned by I. A. Van Dyke, and is used, useful and necessary to secure water for the I. A. Van Dyke water system; that it is necessary that I. A. Van Dyke own and control said water basin and water shed in order to be able to keep said water supply sanitary and potable; that I. A. Van Dyke owns in connection with said water shed and water basin a water right, a stream of 30,000 miners' inches of water both surface and subterranean, which flows from streams and creeks into said water basin together with all the tributaries of said streams and that said water right was located for the purpose and with the intention of developing and securing said water for consumers in the Miami Townsite; that the waters which supply the streams, creeks and tributaries to the water basin originate from live streams, melting snows and rains in the Pinal Mountains and upon the water shed; that these waters are conducted to the water basin; that this water basin is filled with sand and that the waters are retained and stored in said sand; that the wells of the I. A. Van Dyke water system have been dug in the water basin; that by virtue of the fact that the waters supplying the water system of Ida A. Van Dyke is surface water; that it is positively essential and necessary that the water basin and the water shed be kept in a sanitary condition to keep the waters uncontaminated; that during the wet season the waters rise to the surface of the water basin and as the season advances and the drought begins, the waters sink in the basin, making it necessary to run drifts into the lowest portions of the basin, in order to secure sufficient water

for the season's supply; that Miami is located in a desert country where water is very scarce and very hard to secure and expensive to get; that in order to protect the water supply of the I. A. Van Dyke water system, the ownership of this basin is necessary to the system; that in the Miami mining district adjacent to the Miami Townsite are several large low-grade copper mines; that the ore is taken from the mines, crushed and concentrated by wet process; large quantities of water are necessary in these mills; that one mill has a capacity of 3,000 tons per day; and another mill, in course of construction, will have a capacity of 10,000 tons per day; that in order to secure sufficient water to maintain this work it is necessary to pump water into the district several miles; that water is so scarce in this district that one company secures its supply of water from the Old Dominion mine seven miles away, which is pumped to the concentrator; that the demand for water is so great in this desert community that in order to be secure in the water supply for the I. A. Van Dyke system it is necessary to own and control the water basin and water shed; that the Inspiration Consolidated Mining Company in order to protect their enterprise, at a large expenditure of money, has purchased several hundred acres of ground several miles distant from their plant; that they have gone 13 miles below their plant to locate a water right on the Pinal creek and have spent large sums in order to protect themselves; that the demand in this desert country for water ground is great and such ground is valuable; for the same sane business reasons we have copied the large mining indus-

tries of this district to protect the water supply of the I. A. Van Dyke water system in order to secure a sufficient water supply for the Miami Townsite; the I. A. Van Dyke water system was used for the purpose of supplying water to the residents of the Miami Townsite, the Miami Townsite Company having been organized by Ida A. Van Dyke, C. W. Van Dyke and L. D. Van Dyke; ever since its establishment, the I. A. Van Dyke system has followed the policy of furnishing water exclusively to the Miami Townsite; it has refused to supply applicants outside of the Miami Townsite; in Davis Canyon, on ground owned by the Orphan Copper Company, and on the Prochaska Townsite are 200 families to whom the I. A. Van Dyke water system has refused to extend its mains to supply its people, inasmuch as the water that they have located and developed is inadequate to supply more than the needs of the Miami Townsite; at all times during the conduct of the I. A. Van Dyke water system its policy has been to supply the residents of the Miami Townsite and them only; all applicants living outside of said Miami Townsite have been refused connections, and it has been given out at all times that the I. A. Van Dyke water system was established merely for the purpose of supplying water to the residents of the Miami Townsite; the number of wells, the amount of water located, the amount of water basin and water shed purchased has at all times been based upon the principle that only such amounts would be secured as could be used and useful in the Miami Townsite; preparations beyond this have not been made; it is not now intended, nor has it ever been in-

tended by the I. A. Van Dyke water system to supply a greater area than is constituted by the Miami Townsite; * * *

* * * * * * *

* * * As superintendent of said plant one of my duties is to maintain a sanitary condition upon the water shed and water basin, and during the entire time a strict surveillance of this property has been made by myself and my employes to maintain a sanitary condition upon said water shed and water basin. In instances where I have been unable to control said sanitary situation I have reported same to Manager C. W. Van Dyke of said water system, and in several instances in order to control the sanitary situation it has become necessary for C. W. Van Dyke to complain to the local sanitary officers and to the board of health in order to insist upon sanitary measures, and in order to keep said water shed and water basin uncontaminated. Said board of health have co-operated with the I. A. Van Dyke water system with the result that said water shed and said water basin have been kept sanitary and the waters have been kept uncontaminated. At the time of said hearing several loads of fresh stable manure were hauled and dumped upon said water basin by some parties unknown to me, and not connected with the I. A. Van Dyke water system. As was my custom I reported this to Manager C. W. Van Dyke, who reported the same to the sanitary officer. Said manure did not remain sufficiently long to contaminate the waters, but as is usual in such cases was removed or burned. There are no corrals or stables upon the I. A. Van Dyke water basin or water shed, and since the ownership of I. A. Van Dyke all corrals, residents or other conditions which would re-

sult in an unsanitary condition of said water shed or water basin, or contaminate the said waters, have been removed. There is a stable in that vicinity in which is stabled one horse, but said stable is below the wells, and is upon ground owned by the Miami Townsite Company, and because of its being below the wells it cannot in any way contaminate the waters of the said water system.

Affidavit of L. D. Van Dyke (*R., pp.* 77-78, 79-81):

That I am familiar with the water basin and water shed and water right owned by I. A. Van Dyke, all of which is used, and is a necessary part of the system. The water, both surface and subterranean, for many miles in this district has been located and is appropriated for various uses. If I. A. Van Dyke had not located and appropriated the waters leading into the water shed and water basin, it would have been located by others; if located and appropriated by others, it could not have been used unless secured by purchase for the I. A. Van Dyke water system; that waters flowing into the water basin are surface waters. The water basin is filled with sand and during the wet seasons the water soaks into the sand and rises to the surface; as the season advances the water is pumped out through wells into the reservoirs of the I. A. Van Dyke water system. It is necessary that I. A. Van Dyke own said water basin and water shed in order to control its sanitary condition. There are six wagon loads of garbage hauled from the Miami Townsite daily. Because it is convenient to the town, the garbage dump would naturally be located in the water basin or upon the water shed.

Numerous efforts have been made in this direction, but they have been stopped by the officers and employes of the I. A. Van Dyke water system. It was through their efforts that the garbage dump was established a mile south of the town on a different water shed from the I. A. Van Dyke water shed, in order that no garbage should be dumped upon said water basin and water shed.

* * * * * *

That I have examined the opinion and order of the Corporation Commission made on the first day of May, 1914, which is supposed to be based upon the testimony taken at said hearing, and from the examination of said opinion and order I now state that said Corporation Commission did not allow any valuation for the well in the course of construction at the time of said investigation; that at said hearing in the cross examination of said witness, Mr. Ferguson, which appears on pages 28 to 35, inclusive, of said witness, Mr. Ferguson was interrogated and answered as follows, to-wit:

Q. As a matter of fact, don't you know that the acres of land now constituting what you have described as the water shed and which you say is necessary to be owned and maintained in connection with the water supply, is now being used for that purpose, for the accumulation of water to supply that well, is that true, Mr. Ferguson?

A. Those holdings constitute the drainage.

Q. And carries the supply for that well, as you have testified, is that not true?

A. No, because the water shed areas back of the water shed would certainly be a source of supply.

Q. Could this well be maintained without the source of supply which you have described as the water shed? When I say maintained I mean maintained so as to secure water in any useful amount?

A. Well, the drainage comes down that ravine, that draw where the holdings are situated.

Q. Answer the question please. Read the question.

* * * * * *

A. Well, the water is certainly taken through that property.

Q. And it is necessary for the maintenance of the well, is it not? You have already answered me.

A. As I understand it, I have had it explained to me, the land mentioned does not extend to the ultimate source of supply, but that water certainly does drain through the land that you claim."

Q. Please read the question and answer it?

* * * * * *

A. Well, it is necessary for the maintenance of the water supply.

Q. And it is now being used in connection with the water supply?

A. To that extent.

Q. Is it owned by Mrs. Van Dyke?

A. I don't know of my own knowledge.

Q. Didn't you ask?

A. I asked, yes, but I haven't seen the deeds or anything of that sort.

Q. Now then, based upon your statement that this water shed is necessary to be used and is used in connection with the maintenance of the water supply in the well, would you not say that the acreage embraced in that

water shed is of some value to the water system and should be included in your valuation?

* * * * * *

A. In that respect it would have a value to the water company.

Q. Why didn't you estimate the value then?

* * * * * *

A. I didn't estimate the value of the real estate.

Q. You said that five acres were necessary, why didn't you include more than five acres, why didn't you include that portion of the water shed which you now say is necessary to be used and is used in connection with the water system maintained for the supplying of the Town of Miami with water?

* * * * * *

A. Because in my opinion the five acres were necessary for the well and the tank sites and works and I didn't attempt to include the rest of the real estate or make any suggestion either that it was or was not to be included.

Q. Mr. Bullard asked you, suggested to you that you were not a real estate man and could not place a valuation on this land, you did value the five acres.

A. I did not.

* * * * * *

Q. You do think, Mr. Ferguson, that the five acres has some value?

A. Yes.

Mr. Jacobs: The water shed real estate?

A. It would have an element of value to the water company.

Q. And likewise the five acres which you have already mentioned, has a value?

A. Yes.

Q. This real estate included in that water shed has both a physical and intangible value to this water system, has it not, the physical value bieng in the value of the land and the intangible value being the value determined by reason of its connection with the water system and used by the water system, and so would have a physical and intangible value, would it not. It would certainly have an intangible value?

A. Yes, sir, it would.

Q. And it would have a physical value, the land itself?

A. Yes.

From these affidavits it appears that Mrs. Van Dyke has appropriated 30,000 miners' inches, both surface and subterranean, and any and all other waters which flow over the water shed and into said water basin owned by her, and all of the water of the streams and creeks which flow from the headwaters of the Pinal Mountains and all the tributaries and affluents of said streams, and that said streams are supplied from live springs, melting snows and rains in the Pinal Mountains and on the water shed, and constitute the supply of water that flows into and down the gulch and into the water basin; that the water basin is filled with sand in which the water is retained and stored; that during the wet season the water rises to the surface of the water basin (forming what was known as the Granite Springs, where the water appropriation was made) and as the season advances and the drought begins the waters sink in the basin, making it necessary to sink wells or run drifts into the lowest portions in order to secure sufficient water.

The witnesses for the plaintiff in their affidavits assert that the area of the water basin is 60 acres, surrounding which Mrs. Van Dyke owns 129.7 acres, constituting part of the natural water shed, which it is necessary to maintain and police in order to prevent contamination of the drainage into the sand basin. The measures taken by Mrs. Van Dyke to protect the sand basin and water shed are further set forth in the affidavits of Henry Nichols, Sanitary Officer for Miami Precinct (Record, p. 84), and G. C. Snyder and J. H. Lacy, members of the Board of Health for Miami Precinct (Record, pp. 82, 83).

The affidavits filed on behalf of the defendants concede the physical facts as set forth in the plaintiff's affidavits.

Affidavit of W. P. Geary (Record, pp. 93-94):

> At said hearing, the Complainants herein offered no testimony regarding the value of any water basin. The value now claimed is One Hundred and Sixty Dollars ($160) per acre for two hundred and forty acres. Land in the Salt River Valley, under the Roosevelt irrigation project, can be purchased for a less sum. At the hearing, Witness H. M. Brown said Fifty Dollars ($50) per acre would be a liberal appraisement; Witness Mackay deemed Seventy-Five Dollars ($75) per acre sufficient, and such estimates were for land in the gulch where the well is situated and not representing the value of the surrounding hillsides and mountains. These various lands, on the hillsides and in the gulch, have been filed on and are held as mineral claims, the same being unpatented. Witness Mackay operates a water plant of his

own, supplying a different section of Miami, and considers a tract 33 1/3x100 sufficient area for the protection of his well and for water purposes.

The City of Phoenix owns a water system, supplying a city of approximately twenty-five thousand (25,000) inhabitants and approximately four acres are deemed sufficient for the protection of the well and for water purposes.

In the case at bar, about five acres were fenced about the lower well. Irrespective of any claims now made for water shed, I deem this five-acre enclosure, and the value thereof, sufficient for the purposes of the Complainants herein in operating this particular well.

I personally visited the well and observed no effort, on the part of the Complainants herein, to protect the area outside the enclosure from contamination. In fact, within a short distance, estimated at about one hundred yards from the fence, and in the gulch, approximately ten loads of manure was spread upon the ground. Nearby, and on property owned by the Complainants herein, various cottages were situated. These cottages enjoyed no sewer connections and in lieu thereof holes were dug in the ground. All of this is on the alleged watershed.

At the upper, or Stephens well, no enclosure is made. This well is unprotected as far as any efforts of the Complainants are concerned and at the hearing it was testified, by witnesses on behalf of the Complainants herein, that this water shed, in fact, all water shed was "open range."

We allowed five acres for real estate at the Stephens well, of the value of Seventy-Five

Dollars ($75) per acre, that being the figure introduced in the evidence as fair value of the land. Between the upper and lower wells, Witness Mackay owns a mining claim that occupies a very considerable area of the gulch and he stated that to attempt to drill a well on the hillside would occasion an expense in excess of any possible value.

The land about the Van Dyke holdings is higher in altitude than the Van Dyke land. The evidence taken at the hearing disclosed that the source of water supply is beyond any Van Dyke holdings and that water reaches the wells, percolating beneath the surface, and would so continue to do whether the complainants herein owned the surrounding hills or not.

In my opinion, based upon a thorough investigation of all matters germane to the valuation of this plant, and after considering each item separately, a valuation of real estate in excess of that allowed by the Commission is absurd. The evidence at the hearing before the Commission shows that these various mining claims, claimed by the Van Dykes as watershed, are best suited for a chicken ranch and were formerly used as a goat ranch. Near the lower well, and situated in close proximity, is an old barn and corral, the same being occupied by animals, and the ground strewn with manure and refuse. This is situated on Van Dyke property.

* * * * * *

C. W. Van Dyke stated that the side of the gulch containing the manure, barn and corral, cottages, etc., wouldn't drain into the well and that the water on that side contained sulphuric acid percolating from, what I recollect to be Live Oak Gulch. Yet, it is toward

and in the direction of that side of the gulch he is extending a well and drift, for the purpose of collecting water, and asking, for a value thereon, which was not done at the hearing before this Commission.

Affidavit of Ben Ferguson (*R., pp.* 96-97):

The town of Miami is located back from the banks and in the hills along the lower end of a gulch which extends in a general north and south direction with its source in the Pinal Mountains. A large water shed in these mountains is drained directly and by tributary gulches into the sands of this large gulch, the water being submerged, and some fifty feet below the surface of the sand at the complainants' lower well. Portions of the water shed are variously owned by mining companies, individuals and the United States Government.

I find by scaling a map showing complainants' holdings as submitted by their engineer, Mr. R. G. Thomas, that said holdings occupy some 7,500 feet of the gulch, and banks thereof. The complainants, at the time of my last visit, December 12, 1913, furnished water to Miami from two wells, sunk to bed-rock in the sands of the gulch. The lower well, which had previously been the main source of water supply, had partially failed, and the water supply was maintained by connecting the system with a pump at the upper or Stephens well. The two wells together were adequate to meet the demands.

The continuity of the complainants' holdings in the gulch is broken by property owned by J. J. Mackay, said property extending into and along the gulch and back into the hills,

including a portion of the water shed. Because the complainants supply water exclusively from wells in a gulch draining a large area, and because they do not have exclusive ownership of said gulch and water shed, I made no allowance in my valuation for water rights; in fact, I find no claim on the part of the complainants in the record of the hearing before the Arizona Corporation Commission for allowance for water rights.

* * * * * *

There is no evidence to show that the complainants in this cause have made a reasonable effort to protect the water supply against contamination.

I observed heaps of manure a short distance above the enclosures of the lower well; also the carcass of a cow which had not been disturbed between the dates of my first two trips to Miami.

Affidavit of G. P. Bullard (*Record, pp.* 98, 99):

That at said hearing, complainants were requested to show to the Commission what use the foothills near Miami owned by complainants, and designated as the so-called water shed, had in relation to the water utility owned by complianants, but that complainants declined and refused to offer any testimony in that respect, or any testimony as to the value of said lands. That at said hearing two witnesses were examined as to the value of said lands, comprising the so-called water shed, and that one witness, H. M. Brown, a real estate agent in Miami, swore that $50.00 per acre would be a liberal appraisement of the market value for all purposes of said lands so held and owned by complainants. That at said hearing J. J. Mackey, a real estate owner in Miami, and a man experienced

in the values of real estate at Miami, and the owner of a water utility at Miami, testified that the washes and draws in the foothills composing the so-called water shed of complainants might be worth about $75.00 per acre for water purposes and that the remainder of said foothills had little or no value for water shed or other water purposes; that it did not appear in evidence before the Commission the extent of the acreage of said draws or washes in said foothills, but that Mr. Mackey estimated that the acreage of the draws and washes in the Van Dyke holdings, useful for water purposes did not exceed forty (40) acres. That no claim was made by complainants at said hearing before said Commission for any water right value, and the first knowledge that affiant had of any claim of such nature was upon the filing of complainants' bill of complaint herein.

* * * * * *

That it appeared at said hearing that the water distributed by complainants from their said water utility was solely pumped from wells sunk in a gulch near the town of Miami, and that the source and supply of water from said wells was diffused ground water and percolating water; it did not appear from the evidence in the hearings before said Commission that any of the water supplying said wells was derived from any stream or spring or was running water.

These affidavits, in so far as they purport to state the testimony of witnesses before the Commission, are hearsay.

It thus appears that the Commission allowed only

$750 as the value of real estate—five acres at the lower well and five acres at the upper or Stephens Well, which it regarded as sufficient for the mere *operation* of the wells,—and ignored any value for water right by appropriation, upon the assumption that the source of supply was diffused ground and percolating water and not from any stream or spring and not running water (affidavit of Bullard) and ignored the water itself as an element of value "because the complainants supply water exclusively from wells in a gulch draining a large area and because they do not have exclusive ownership of said gulch and watershed" (affidavit of Ferguson).

The Court below, in its opinion, disposed of the claim for allowance of the value of the water right, water basin and water shed, as follows (Record, pp. 117, 118):

> As above stated, it is complained that the Corporation Commission failed to include in the property of the said water system, or consider or allow, a large tract of land containing about 189 acres. It is true that the Commission did not allow anything for this property and their reasons therefor are stated in their opinion, as follows:
>
> "The contention of the Company that the hills forming the banks of the main stream and small tributary gulches should be included in the valuation on the ground that such hills divert water into the main channel is not considered by this Commission. No effort of the company could prevent water being so diverted and it seems that the snow banks of the Pinal Mountains or the clouds could attain the same elements of value. The

company offered no direct evidence as to the value of real estate and the testimony of witness Mackey appears not to have been controverted."

The Company alleges that this tract of land was of the value of more than $38,400.00. In the affidavits submitted by complainants the same is valued at $73,720.00. It will be observed from an examination of these affidavits, especially those of L. F. Fletcher and A. Reid, both of whom are dealers in real estate, and both of whom fixed the value at exactly the same figure, that they did not place a value upon this land for water purposes or show how or in what manner it was worth $73,720.00 when used in connection with said water system. They simply valued the land itself regardless of the use to which it had or might be put; in other words, they gave the total value of the land, and in arriving at that value they stated,

"I arrived at my estimate of said valuation and base the same upon the sale of real estate of the same or similar character in the vicinity of said land."

So far as the records show, this land might be underlaid with valuable mineral deposits or it might be valuable for residential or other purposes, and it seems absurd to ask that they be allowed to require the consumers of water in the townsite of Miami to pay a return upon the actual value of this land, independent of its value when used as a part of, or in connection with, said water system, and we do not find anything in the record which shows its value when so used, if it has ever been so used. It was stated in argument and not denied that the title to the land was acquired under the mineral laws of the United

States. Suppose the complainants had gone back to the top of the Pinal Mountains and acquired twice or thrice the area now owned by them, would it be contended that because these vast areas form a part of the water shed and the water finds it way ultimately into the complainants' wells that an allowance should be made for all such property? We think not, and believe that the Corporation Commission did not err when it refused to make an allowance for this property.

We are likewise of the opinion that the Commission properly disallowed the claim for $20,000.00 for a water right. The affidavits submitted do not give a definite description of the alleged water right, and on the evidence submitted we are not able to determine whether in fact the complainants have made a legal appropriation of either underground or flood waters.

But the affidavits do give a definite description of the water right, the affidavits of Corcoran, Thomas and Fletcher in particular, wherein it was averred:

> That I am familiar with a certain water right that is owned by I. A. Van Dyke; that I. A. Van Dyke has appropriated and claims perpetually 30,000 miners' inches, both surface and subterranean, and any and all other waters which flow over said water shed and into said water basin owned by I. A. Van Dyke, and all of the water of the streams and creeks which flow from the headwaters of the Pinal Mountains and all the tributaries and affluents of said streams; that said streams are supplied from live springs, melting snows and rains in the Pinal Mountains and on the water shed and constitute the supply of water that flows into the water basin. * * *

This must be presumed to embrace the language of the notice of appropriation and if there were any question as to compliance with the local law in respect of form, substance, posting, or recording, the defendants would have raised it. For the purposes of the application for preliminary injunction it was not necessary for the plaintiffs to present a certified copy of the notice of appropriation, any more than it would have been necessary to present an abstract of title if the item in question had been land.

But compliance with the local statute in respect of notice of appropriation, posting, recording, etc., operates only, by the doctrine of relation, to secure the right in advance of actual diversion or use. Appropriation is effected by completed actual diversion or use for a beneficial purpose, even though the local statute in respect of notice, etc., may not have been complied with. 1 Wiel Water Rights in the Western States, 3d Ed., Sections 364, 365.

The defense did not question the fact or act of appropriation or the physical facts set forth in the plaintiffs' affidavits, but, conceding that a large water shed in the Pinal Mountains is drained directly and by tributary gulches into the Van Dyke sand basin in the large gulch in question (report of Commission, Record, p. 28; affidavit of Ferguson, *supra*), took the position that the source and supply of water from the wells was, notwithstanding, to be classed as diffused ground and percolating water (affidavit of Bullard).

It appears, and is not controverted, that the water which accumulates in the said basin is the natural flow down the gulch. The appropriation made by Mrs Van Dyke was, and is, of this flow, whether surface or underground.

The water is in no sense percolating or diffused ground water, but water which flows on the surface in the gulch and its tributaries in defined channels in the upper portion of the water shed, and underground, still in a defined channel, when it reaches the lower part of the gulch and sinks into the sand basin. It appears that the wells reach the bed rock of the gulch, demonstrating that the sand merely occupies the bed of the gulch and that the water which flows into the sand basin is still confined in a defined channel, and, as also appears, in the wet season it rises to the surface, forming springs, the flow from which, if not diverted, would continue down the gulch.

The sand basin is merely a natural reservoir in the bed of the gulch or water course, and the situation is the same as if Mrs. Van Dyke, having appropriated the flow of water in the gulch and its tributaries, had built an artificial reservoir to store and conserve the water during the dry seasons.

That water under such conditions is properly subject to appropriation and that Mrs. Van Dyke by actual use has acquired a valid water right, are fully sustained by the authorities.

Underground flow is subject to appropriation in Arizona.

Howard vs. Perrin, *supra.*

Water saturating the sand and gravel constituting the bed of the channels and sources of streams is as much a part of such streams as the surface flow.

2 Wiel, Water Rights in the Western States, 3d Ed., Sections 1077, et seq.

This was recognized by this court in Kansas vs. Colorado, 206 U. S., 46, 144.

> "No question of percolating water is involved, because the waters passing through the sand and gravel constituting the bed of a stream, and the lands so nearly adjacent that the only and natural outlet would be through such channel, are not percolating waters, as ordinarily defined by the common law, but, as already stated, are a part of the waters of the stream." Buckner Irr. M. & I. Co. vs. Farmers Ind. D. Co. (Colorado), 72 Pac., 49, 52.

The rules of evidence applicable are stated in Ryan vs. Quinlan (Mont.), 124 Pac., 512, 516:

> "Subsurface water flowing in defined channels reasonably ascertainable is subject to the same rules as water flowing in surface streams; but there is no presumption that any subsurface water, in whatever form it may be found, is tributary to any stream. City of Los Angeles vs. Pomeroy and Metcalf vs. Nelson, supra. The burden is upon him who asserts this to be a fact. We think that it may be established by circumstantial evidence, as was done in Strait vs. Brown and Forbell vs. City of New York, supra; but the evidence must have so much of substance and probative value as will reasonably exclude the contrary hypothesis. This court recognized this rule in Leonard vs. Shatzer, 11 Mont., 422, 28 Pac., 457, and in Hilger vs. Sieben, 38 Mont., 93, 98 Pac., 881."

We submit that the showing in the affidavits was amply sufficient to establish, for the purposes of the

application for injunction *pendente lite*, that Mrs. Van Dyke is utilizing as part of the water system a valid water right by appropriation, of substantial value, for which no allowance was made by the Commission in its valuation of the plant.

The showing on this point is so convincing that it seems unnecessary to consider the reciprocal point that if Mrs. Van Dyke has not a valid water right by appropriation, but is utilizing only diffused ground and percolating water, the action of the Commission is equally confiscatory in not allowing for the value of the water itself as property or as an element in the value of the land comprising the water basin. In re San Gabriel Valley Water Co., *supra*.

There is a dilemma here from which there is no escape. Either the value of the water or the value of the water right must be recognized.

We are, here, not concerned with the value to be placed upon the water right, or upon the water as an element in the value of the land, but merely with the fact that it is substantial and has been omitted. San Joaquin Company vs. Stanislaus County, supra.

The further question is presented whether the full area of the water basin, with or without the additional Van Dyke holdings constituting the greater portion of the immediate water shed, is, in view of the necessity of withholding it from other surface use and policing it, in order to prevent contamination of the water supply and insure potable water for use by the consumers, a proper element of the plant for which allowance must be made.

We submit that the showing in the plaintiff's affidavits of the necessity of maintaining and policing

the water basin and immediate water shed in order to insure potable water is not met by the defendant's affidavits.

It is obvious that if the water is not controlled by appropriation, but is merely diffused ground and percolating water, control of the whole water basin is necessary in order to insure control of sufficient water.

The Commission acted upon the theory that five acres at each well were reasonably necessary to the mere *operation* of the well and wholly ignored the element of necessity of control of the water or water basin area and protection against contamination.

According to the Commission's theory the water system is to be appraised as if Mrs. Van Dyke owned only five acres at each of the wells and all of the remainder of the water basin and the Van Dyke holdings on the sides of the gulch were owned by others. In such case, however, the other owners of land in the water basin would be in a position to enjoin Mrs. Van Dyke from pumping water in excess of the share of the common supply to which ten acres out of sixty, or whatever area might be involved, would be entitled (2 Wiel, Water Rights in the Western States, 3d Ed., Secs. 1041, et seq., 1100, et seq.), and control of the sand basin and immediate water shed for the purposes of maintenance and policing, necessary to insure potable water, would be gone.

Obviously, the whole of the sand basin and the other Van Dyke holdings constituting the greater portion of the immediate water shed, must be recognized as a necessary element of the water system and, whether the land itself or the use thereof for the pur-

poses of the water system be taken as the basis, the value thereof is substantial and has been ignored.

The value of the strips of land occupied by the pipe lines was also ignored.

These strips of land are owned in fee by Mrs. Van Dyke. See affidavit of I. A. and Cleve W. Van Dyke (Record, pp. 66, and 68).

They are described more at length in the affidavits of R. G. Thomas (Record, pp. 59, 60-61), and L. F. Fletcher (Record, pp. 63-64). We quote from the affidavit of Thomas:

> * * * that the land owned by I. A. Van Dyke and used and useful in connection with the said water system consists of various strips of land four feet in width through and upon which mains are laid and various strips of land two feet in width through and upon which the lateral pipes connected with said mains are laid, together with a few small strips of land reserved for future use in the laying of mains and lateral pipes, which land is situated within the Miami Townsite, additions thereto and land adjacent thereto owned by the said I. A. Van Dyke. * * *
>
> * * * that the strips of land through and upon which the main and lateral pipes of the said I. A. Van Dyke water system are laid in the Miami Townsite and adjacent thereto, and the strips of land reserved for future use in the laying of mains and lateral pipes, is of the value of $43,884.34. These values were secured by a very careful tabulation made as follows:
>
> The rights of way for the water mains are

four feet wide; the rights of way for the laterals are two feet wide. The value of the rights of way were determined upon the basis of the value of the abutting property, the amount of value of the abutting property being determined in all instances upon the basis of a valuation placed upon said property by the County Assessor for the year 1914; this method was used in all parts of the townsite with the exception of a proportionately small area in the western part of the Townsite. In this western portion the Assessor had failed to place a valuation upon this section in lots and blocks, but included the valuation of other property. Mr. L. F. Fletcher, a prominent real estate man of Miami, a man who is familiar with local values in the Townsite of Miami and surrounding country, was chosen to place a valuation based upon the assessed valuation of the lots and blocks in the Townsite, upon this portion of the town, and the value of the rights of way were secured in this portion of the townsite in that way. In securing the unit value, the number of square feet of the abutting property was determined and the assessed valuation placed thereon by the Assessor was determined by the number of square feet area. This unit value was then used as a factor in finding the value of the abutting right of way by multiplying the number of square feet in the abutting right of way by the unit value; the areas of the lots and the areas of the rights of way were determined by my own calculations; the values of the property were determined by the County Assessor and L. F. Fletcher.

The affidavits on behalf of the defendants were silent regarding these strips of land.

The court below, in its opinion, disposing of the claim for allowance of the value of these strips, said (Record, p. 118):

> "It is next claimed that complainants are entitled to an allowance of $43,884.34 on certain strips of land in Miami from two to four feet wide through and upon which the water mains and lateral pipes of the system are laid, and other strips of like width so located and reserved for future use in the laying of pipes. These strips seem to have been acquired by Ida A. Van Dyke by purchase from the Townsite Company. Pretermitting any consideration of the right of that company to thus dispose of any part of the streets in Miami, it is certainly true that these strips should be of value, so far as this case is concerned only as a means of extending the pipes. It could have no value as residence or business property, for it was in the streets, and subject to the servitude of public passage, and no structure could be placed on it which would interfere with the right of the public. We think the Corporation Commission committed no error in rejecting such claim,"

and then went on to criticise the method by which the plaintiffs' witnesses arrived at the valuation of $43,884.34.

As noted, the court below entertained the assumption that these strips of land were obtained by purchase from the Townsite Company, but there is nothing supporting that assumption. The inference, if

any, from the language of the affidavits of Thomas and Fletcher, is that the strips were reserved in the conveyance to the Townsite Company. However that may be, the defendants did not question the fact of ownership in fee.

The court below expressly recognized that these strips were of value as a means of extending the pipes, evidently meaning as rights of way for existing pipes as well as for future extensions, but sustained the Commission in omitting any allowance therefor.

It is obvious, however, that they are an integral and necessary element of the water system and that the land itself, or the use of it, has substantial value, and being ignored, the action of the Commission is confiscatory. San Joaquin Water Company vs. Stanislaus County, *supra.*

There are some other items (spur track, unfinished well, pumping engine, etc.), ignored by the Commission in whole or in part, and dismissed by the court below as being too small to produce any material effect (Record, p. 119).

The spur track is a small item, but the unfinished well and the pumping engine are relatively large.

As to the pumping engine, value claimed $3,784.06, see affidavits of Cleve W. Van Dyke (Record, pp. 70, 71), T. J. Corcoran (Record, p. 74), L. D. Van Dyke (Record, pp. 76, 77).

And as to the unfinished well, value claimed $2,265.71, see affidavits of Cleve W. Van Dyke (Record, p. 57), R. G. Thomas (Record, p. 59), Cleve W. Van Dyke (Record, pp. 69, 70), L. D. Van Dyke (Record, p. 77).

Mrs. Van Dyke's Water Business is of Such Private and Non-Public Nature as That Attempted Governmental Rate Fixing, Even if Sanctioned by the State Constitution, Would be Violative of the Federal Constitution.

In German Alliance Ins. Co. vs. Lewis, 233 U. S., 389, this court merged all previous distinctions and sanctions for governmental control, into the comprehensive formula "so far affected with a public interest" as to justify regulation of rates, explaining, however, per McKenna, J. (pp. 406-7):

> "We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private, and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property —business of common carriers—is obviously of public concern, and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of *water* and light, including in the latter gas and elec-

> tricity. We do not hesitate at their regulation nor of the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates," etc.

In mentioning utilities which are denominated public, such as the furnishing of water, etc., it is obvious that the court there (as in Spring Valley Water Works vs. Schottler, 110 U. S., 347) had in mind public water utilities, as generally understood, and was not concerned with any distinction between public systems subject to control and private water businesses not subject to control in respect of rates.

In the dissenting opinion of Justice Lamar (concurred in by the Chief Justice and Justice Van Devanter), after listing the rate regulated occupations, including "the confessedly close case of the irrigation ditches for distributing water" (citing San Diego L. & T. Co. vs. Jasper, 189 U. S., 439, which evidently was not the case in contemplation), it was said (p. 426):

> "It is to be noted that in each instance the power to regulate rates is exercised against a business which in every case used tangible property devoted to a public use. Some of them had a monopoly (Spring Valley Water-Works vs. Schottler, 110 U. S., 354). Some of them had franchises. Most of them used public ways or employed property which they had acquired by virtue of the power of eminent domain. They were therefore subject to the correlative obligation to have the use, of what

had been thus taken by law, fixed by law. And as further pointing out the characteristics of the public use justifying the fixing of prices, it will be noted that, with the exception of toll mills (which, however, do employ property devoted to a public use), they all have direct relation to the business or facilities of transportation or distribution,—to transportation by carriers of passengers, goods, or intelligence by vehicle or wire; to distribution of water, gas, or electricity through ditch, pipe, or wire; to wharfage, storage, or accommodation of property before the journey begins, when it ends, or along the way.

When thus enumerated, they appear to be grouped around the common carrier as the typical public business, and all employing in some way property devoted to a public use."

In the Pipe Line cases (234 U. S., 548), it was held, with respect to the Uncle Sam Oil Co. (p. 562):

"This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a State line to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."

The Chief Justice, however, in concurring in the result, said (pp. 562, 3):

> "It seems to me that the business thus carried on is transportation in interstate commerce within the statute. But despite this I think the company is not embraced by the statute because it would be impossible to make the statute applicable to it without violating the due process clause of the 5th Amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation. It is shown beyond question that the company buys no oil, and by the methods which have been mentioned simply carries its own product to its own refinery; in other words, it is engaged in a purely private business. Under these conditions in my opinion there is no power under the Constitution without the exercise of the right of eminent domain to convert without its consent the private business of the company into a public one."

Mr. Justice McKenna, concurring in the result as to the Uncle Sam Oil Co., but dissenting from the holding that the Act of June 29, 1906, declaring oil pipe lines common carriers, was applicable to pipe line concerns transporting all oil offered upon condition that it first be sold to them on practically their own terms, and, as so applicable, valid as an exercise of the right to regulate commerce, gave what may be regarded as an explanation or definition of the language of the majority opinion, delivered by him, in German Alliance Ins. Co. vs. Lewis, supra, which we have quoted. He said (pp. 564-5, 567):

"It is contended that the act offends the 5th Amendment in that it takes their property without due process of law. But what is due process of law, and wherein does its requirement limit the power of Congress? Neither question can be answered in a word, and the usual considerations are encountered when the courts are called upon to investigate the limits of legislative power. Autocracy is free from such perplexities. When authority can say, 'The State—it is I' it meets no impediments to its exercise. But that extreme illustration is not necessary. Even a government under a Constitution, if it be unwritten, may have a power that leaves nothing for the courts to do other than to enforce the fiats of legislative authority. Under a written Constitution, however, there is a sovereignty superior to the legislature, that of the people expressed in the Constitution. How to reconcile legislation with the limitations of the Constitution and leave government practical in its exercise is a problem which comes to this court often. It is the problem in the case at bar. It is to be regretted that there is no indisputable standard for its solution,—no indisputable test of due process of law. We know that an act of legislation does not necessarily satisfy it. It may, however, be sufficient, or, to be more careful and accurate, there may be a regulation of the uses of property whose legality cannot be denied. Regulation is not a taking, and we are brought to the inquiry, what uses of property will subject it to regulation? I mean regulation in a special sense, not in the sense in which all property, whether its uses be public or private, is subject to regulation. 'Property,' it is said, 'becomes clothed with a public interest when used in a

manner to make it of public consequence, and affect the community at large.' 'When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.' Munn vs. Illinois, 94 U. S., 113, 24 L. ed. 77; Budd vs. New York, 143 U. S., 517, 36 L. ed., 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass vs. North Dakota, 153 U. S., 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup Ct. Rep. 857; German Alliance Ins. Co. vs. Lewis, 233 U. S., 389, ante, 1011, 34 Sup. Ct. Rep. 612. Manifestly the principle needs the definition of the facts of the cases. In three of them the fees for storage of grain were regulated; in the other the price of fire insurance; but dominant in all, as giving character to the property, was the fact that its use was voluntarily offered to the public. There was no compulsion of use or service. This must be kept in mind as the determining circumstance. Conduct may be regulated which cannot be initially commanded. The rates of interest may be regulated, but loans cannot be compelled. There is further illustration in a case subsequent to those cited. In W. W. Cargill Co. vs. Minnesota, 180 U. S., 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423, an injunction was sought against the operation of an elevator and warehouse situated on the right of way of a railroad until its operator should have obtained a license from the railroad and warehouse commission of the State under a law of the State. The defendant company bought and sold grain, although its elevator was used for storing its own grain only."

* * * * * *

"This court, by Mr. Justice Harlan, sustained the judgment of the State court and said 'that the mere requirement of a license was not forbidden by the 14th Amendment.' Answering the suggestion that other provisions were repugnant to the Constitution of the United States, it was said that the license would give authority to carry on the business under the valid laws of the State and the valid regulations of the commission. The case, therefore, manifestly decides that the use of the warehouse by others could not have been legally compelled, and in the other cases, as we have seen, it was the act of the parties, not the power of the law, which devoted the property to the public interest. In the Munn Case it was said of the owners of the elevators that there was no attempt to compel them 'to grant the public an interest in their property, but to declare their obligations if they used it in this particular manner.' And further, 'He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.' "

"In the cases cited, therefore, there was a regulation of uses which were extended voluntarily to others. I recall no case where the use was compelled, and by the use so compelled regulation was justified. The case at bar has no fellow in our jurisprudence."

and at pp. 570-573:

"The companies do not possess the right of eminent domain, and their lines are laid over private rights of way, except some of them for short distances have laid their lines along the rights of way of certain railroads under some contract arrangement with the

railroads, one of them for a distance of about 300 miles. They, however, have in many instances also laid their lines across or along public streets and highways by permission or consent of the local authorities. None of them has ever held itself out as a common carrier, or in fact ever carried oil for others, but they have carried only such oil as they produced from their own wells or purchased from other producers, and which they owned when the transportation took place.

* * * * * *

"In other words, it is argued, the companies have made themselves masters of their respective fields by the constraint of the sale of the oil of other owners to them upon terms more or less dictated by them by availing themselves of their 'monopoly of the means of transportation.' This is the charge. The facts of the case do not sustain it except as they exhibit the advantages of the possession of property which others do not possess. Must it be shared by those others for that reason? The conception of property is exclusiveness, the right of exclusive possession, enjoyment, and disposition. Take away these rights and you take all that there is of property. Take away any of them, force a participation in any of them, and you take property to that extent. These are commonplaces, but at times—it may be always—commonplaces are our best guides when rights are concerned. They are pertinent to this case. The employment of one's wealth to construct or purchase facilities for one's business greater than others possess constitutes no monopoly that does not appertain to all property. Such facilities may give advantages, and, it may be, power; so does all property and in proportion

to its extent. It may well, then, be asked—What extent of trade advantages, what degree of power in purchasing, what superiority in facilities of transportation or disposition of articles may be grounds of the exercise of congressional control? If the owner of a small oil well may be given rights in the facilities of the appellee companies, why may not the owner of a small business be given rights in the facilities of a larger business, if Congress sees fit to say that the public welfare requires the gift? Can any privilege be claimed for oil that cannot be claimed for other commodities? May a jobber of merchandise in Washington who conducts a trade in Baltimore and other places, and owns special facilities for the transportation of his merchandise, be compelled to share them with competitors who may not be able to afford as ample ones, and in consequence be forced to sell their property to him at a disadvantage? Or, recurring to the illustration of W. W. Cargill Co. vs. Minnesota, can one who erects elevators for the storage of grain of his own raising (such instances exist), and uses it as well for grain of his purchase (there are more of such instances), be compelled to share their advantage with other growers or purchasers of grain? The advantages of his situation are quite as manifest as the advantages the appellees enjoy, and the effect on interstate commerce transportation as marked. Upon the same principle, one who builds a railroad to a coal field or to a forest must share it with other owners in the field or forest if he ventures to purchase their productions. Such is the principle of the present decision. Under it what attribute of private property is left?

"Let us not exaggerate the conditions or

> by form of statement put out of view essential elements. What duress is employed that is not employed when terms are exacted as a condition of the use of property? Or, rather, and more accurately, what duress is used except the exclusion of others from the use of property which they do not own? There were no prior or present rights in other owners of oil wells to the use of the lines of the appellee companies. They contributed nothing to the construction of the lines, and their exclusion from their use is the exclusion resulting from the separate ownership of property as distinguished from rights of community ownership."

* * *

It is thus evident that, in adopting the comprehensive formula, "so far affected with a public interest" as to justify regulation of rates, in deciding the German Alliance Insurance Co. case, this Court did not strike down the distinctions which had been recognized in previous cases, but merely added insurance to the list of businesses held subject to regulation.

The principles and distinctions recognized by this Court have been applied by the Supreme Court of California in a line of cases which, we submit, are conclusive of the present question.

In Burr vs. Maclay Rancho Water Co., 160 Cal., 268, 280, 116 Pac., 715, 721, it was said:

> "The water taken by the defendants to supply the needs of the interveners is not taken for public use. It is not offered to the public generally, or to all who may want it within a certain territory. It is taken solely to ful-

> fill the private contractual obligations of the defendants to deliver water to certain lots which it has sold with a water right. This is a private use. Hildreth vs. Montecito, 139 Cal. 29, 72 Pac. 395; Barton vs. Riverside, supra, 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331; Gilmer vs. Lime Point, 18 Cal. 252."

In Thayer vs. California Development Company, 164 Cal., 117, 128 Pac., 21, after reviewing at great length the distinctions between public and private use and the authorities, the Court held that the water appropriated by the California Development Company was devoted only to private use, and the Company could not be compelled to furnish water to the plaintiff, saying:

> "Under the doctrines thus established, it is evident that the California Development Company has not dedicated to public use the water which it diverts from the Colorado river, and that it has not offered it for sale, rental, or distribution in such a manner as to constitute a public use thereof. In its notice of appropriation, it declared that it claimed the water for itself and others. It did not claim it for use by the public, nor designate the 'others' to whom it was to be furnished. The notice stated that the water was claimed for the purpose of developing power, and for the irrigation of lands in the 'New River Country,' situated in what was then San Diego County, but it did not say that it was to be used upon all said lands, nor generally upon the lands in said country. Upon each of these essential elements of a public use, the most

that can be said is that the notice is silent. There never was any declaration by that company that the water was to be devoted to public use, or that it was to be offered generally for sale in California, or to all landowners in the New River Country, or in any district or part thereof, or even to all landowners along the lines of its ditches or the ditches of its auxiliary companies. No such offer or declaration has ever been made, nor has it ever been the custom or practice of the company or of its auxiliary companies to sell water in that way. The method adopted by it for the disposition of the water, and its conduct in distributing the same, have been wholly inconsistent with the idea that the water was held out for general sale or distribution, and it has been consistent only with the theory that the intention was to retain control of the water to the extent, at least, of choosing for itself the persons and corporations to whom it should be sold or delivered, and the terms and conditions on which such sales or deliveries should be made. It has, in fact, retained such control, and it has not disposed of the water otherwise than according to this plan. For this purpose it laid out seven separate districts in the New River Country, with distinct boundaries. In each of these it organized a private water corporation. The purpose of each corporation, as expressed in its articles, was to procure water for the irrigation of such lands situated within the exterior limits of the district as should belong to its stockholders, and to no other persons. Each share of the stock was to be located upon certain designated lands—one share being allotted to each acre—and the water was to be apportioned ratably among the stockholders

according to the number of shares owned. The stock was not free, but was to be sold at a fixed price. To these corporations, and to no other persons, the Development Company sold the water it diverted, receiving therefor certain shares of stock of said corporations, with the right to sell the same and have them located on lands in the district by the purchasers, and with an agreement by each auxiliary company to pay thereafter an annual charge of 50 cents per acre foot for the water delivered to it. There were other restrictions which it is not necessary to mention. The Development Company sold the stock of these auxiliary companies to the landowners within the respective districts, and the same has been located by the respective companies upon particular tracts of land therein. No water has been sold or distributed, or offered for sale or distribution, in any other way, or to any other persons, except small quantities furnished by special agreement to a power company and to the city of Imperial. No right in any other person to demand or receive water upon any terms or at all has ever been recognized, allowed, or conceded either by the Development Company or any of the auxiliary companies. It appears, therefore, that the Development Company has always, either directly or through the auxiliary companies, selected the persons to whom it would sell and distribute the water and fixed its own prices. A use thus restricted, limited, and controlled by the owner is in no proper sense, according to the foregoing authorities, a public use.

"We have hitherto considered the case upon the theory that all the other corporations mentioned, including the Mexican Company,

are but subsidiary to and agents of the California Development Company for the carrying out of its plan for the distribution of its water. The effect is the same, however, if those companies should become, or be considered independent companies—that is, merely purchasers of the Development Company's water. It is true that, since their organization, the districts, by reason of the sales of their corporation stock to the land-owners, have become independent, so far as management is concerned, of the Development Company, although still bound by the contracts made between them. But if they are viewed as independent companies, the fact remains that the Development Company has not sold, or proposed to sell, or disposed of its water at all, except to those companies and to them only upon the terms and restrictions fixed by the respective contracts, and that those companies have not applied the water to public use, but have held the same exclusively for their respective shareholders upon terms fixed by the by-laws of the company. It appears that the Mexican Company is selling a part of the water to consumers in Mexico along its line. This does not change the result. It does not appear that this water is sold or offered to the public generally, or to all landowners along the line. Even if it were so, the fact that this company is carrying on a public use in Mexico would not affect the character of the service of the other companies doing business in California. It is very clear from all the proceedings taken that the Development Company not only did not intend to engage in a public service but that it was well advised concerning such service, and carefully devised its plan and drew its

> contracts to avoid being placed in that position. The Company has placed itself clearly within the principles stated in McFadden vs. Los Angeles, supra, McDermont vs. Anaheim Co., supra, and Barton vs. Riverside, supra, under which the use which it makes of the water is not a public use."

In Del Mar Water Light & Power Co. vs. Eshleman, 140 Pac. 591, the Supreme Court of California reviewed and set aside the decision and order of the Railroad Commission of California holding the Del Mar Company to be a public service corporation and requiring it to furnish water to one Glass, saying (per Melvin, J.):

> "That the intention of the incorporators of the water company was merely to furnish an instrumentality for managing and operating the water department of the South Coast Land Company there can be little doubt * * *
>
> "But in practice its contracts were with the vendees of the land company. The serving of water to the 17 inhabitants of the 'old town' of Del Mar was not sufficient to make the water company a public utility, offering its water to the general public. When the land company bought all the unsold lots of the town site its property surrounded the places of residence of these inhabitants of 'old town.' It bought and abandoned the old wells from which these people derived their supply, and its arrangement with the water company to serve water to them no more constituted the latter a public service corporation than did that contract by which the Santa Fe Land Improvement Company was to receive a certain

quantity of the water which might be developed. The sales to contractors who were engaged in road building were no more significant than would be similar accommodations by a farmer from his wells, and the same thing may be said of the trifling amounts of water sometimes sold to neighbors and by them hauled away in barrels. That the water company had refused to furnish persons who had not purchased land from the South Coast Land Company was shown without contradiction; and while the reasons assigned were sometimes the scarcity of water, the fact of refusal remains. The fact is highly significant. It is also significant that under the arrangements which the water company had with the land company the latter was furnished with a large amount of water through unmetered pipes for the use of its hotel and other buildings. All of these facts and circumstances indicate that the Del Mar Water, Light & Power Company was merely the incorporated water department of the South Coast Land Company. Indeed, the Railroad Commission, while holding that the water company was organized as a public utility, recognized some superior right to the water by the South Coast Land Company. The following quotation from the opinion illustrates this:

* * * * * *

"It is explained in the brief that this language merely meant that if in the future it becomes necessary to limit the territory to be served by the utility, it would be fair and reasonable to consider first the lands of the South Coast Land Company. If, however, the water company has held itself out to the general public of Del Mar as willing to furnish water

to that territory, why should the former ownership rather than the location of property be the controlling factor in case a subsequent limitation of the area to be served should become necessary? No logical reason presents itself to our minds why one part of the community should thus be favored, unless there be a recognition of the right of private contract between the water company and a selected class of customers, and the moment such right is recognized the status of the water company as a supposed public utility disappears.

* * * * * *

"We are of the opinion that the Del Mar Water, Light & Power Company never intended to engage in a public service, and that it did not do so. Whenever the land company sold a lot it agreed to conduct electricity and water to the property line, and the purchaser in each case entered into a contract with the water company for the continued furnishing of those commodities. The facts of this case bring it squarely within the principles announced in Thayer vs. California Development Company, 164 Cal. 119, 128 Pac. 21. The Del Mar Water, Light & &Power Company was organized for the purpose of selling water to the purchasers of real property from the South Coast Land Company. It has consistently adhered to that purpose. If the purchaser of land from a rival vendor desires water, he may develop it by buying water rights or by condemnation of water for himself and neighbors. He may not demand a part of the private supply of this petitioner. The determination that the petitioner is a public utility is erroneous, and the Railroad Commission is without jurisdiction in the premises."

The court below in its opinion, as authority for enjoining the enforcement of the order of the Arizona Corporation Commission requiring Mrs. Van Dyke to furnish water to the Prochaska (Live Oak) addition, quoted from a concurring opinion in the Del Mar case, which, after asserting that the Railroad Commission has no power to compel a corporation which owns property in private right and has not dedicated it to any public use, to apply it to a public use of any kind, proceeded upon the theory that a finding that the Del Mar Company had not dedicated its property to any public use was not necessary to decision of that case, but that, assuming that the company had made a limited dedication to public use, the Commission was without jurisdiction to require it to extend its service area.

The Court below thus assumed that Mrs. Van Dyke, in furnishing water to purchasers of lots in her subdivision, had made a limited dedication of her water system to public use, and failed to appreciate the distinctions recognized in the California cases.

It is to be noted at this point that the California Courts recognize that corporate character of the owner of a water system is not in itself ground for governmental control of the use of its property, but that voluntary dedication to public use is the essential element.

What amounts to dedication to public use, is further illustrated by the recent case of Palermo Land & Water Company vs. Railroad Commission, 160 Pac. 228, wherein the Supreme Court of California after saying:

> 1. The petitioner contends that it is not a public utility, and is, therefore, not subject to the jurisdiction of the Commission. The Palermo Company, it is claimed, has not offered its water to the public, but has merely entered into 'private contractual obligations * * * to deliver water to certain lots which it has sold with a water right.' Burr vs. Maclay R. W. Co., 160 Cal. 268, 280, 116 Pac. 715, 721. Attention is directed to several decisions of this court holding that such disposition of water 'is essentially a matter of private contract and it shows no intent to create a public use.' Thayer vs. California D. Co., 164 Cal. 117, 128 Pac. 21; Burr vs. Maclay R. W. Co., supra; Hildreth vs. Montecito, etc., Co., 139 Cal. 22, 72 Pac. 395; Barton vs. Riverside W. Co., 155 Cal. 518, 101 Pac. 790. It is further argued that, if our statutory provisions (St. 1913, p. 84; St. 1915, p. 1273) are to be construed as declaring that water companies of this character are public utilities, such statutes are in violation of both the federal and State Constitutions. We do not, however, feel called upon to go into the constitutional questions thus suggested, for the reason that we feel satisfied that, without regard to statutory provisions, the conduct of the Palermo Company was such as to take its operations out of the category of a private use as defined by Thayer vs. Development Co., and like cases."

found that the Palermo Company in deeds of conveyance of lots had covenanted to furnish water "at such rates as may be fixed by law in the district in which said lands are situated," which implied that the service was to be that of a public utility, and had applied

to the Railroad Commission to have its rates for water established and had secured an order allowing an increase in rates, which was effective to "change the use from a private and particular use to a public use, so as to make the service and terms of delivery subject to regulation and control by public authority. (Franscioni vs. Soledad Land & Water Co., 170 Cal., 221, 149 Pac. 161)."

It appears, therefore, that in California where the law of western water and water rights and commission control may be said to have been principally developed, it is settled that the establishment of a water system for supplying water to purchasers of lots in a sub-division owned by the owner of the water system is a private use and that attempted governmental control of service or rates would be taking private property without compensation and without due process of law.

The sense of the people of California on this question must be presumed to be the sense of the people of Arizona and may be accepted by this Court as a safe criterion. But aside from this convincing recognition of the private and non-public character of Mrs. Van Dyke's water business, the same result follows from application of the principles and distinctions recognized by this court.

Mrs. Van Dyke pumps the water on her own land, stores it in tanks on her own land, and thence conducts it through pipes all upon her own land (the strips reserved for conduits are owned in fee by her) and delivers to purchasers at the boundary line between her and their properties. The situation is the same as if she stood on one side of the boundary line

and handed water over it to the purchaser standing on his own land.

She has not dedicated or devoted her property to the use of the public and, as the court below held, she is not under obligation to sell water to the public generally.

Water when needed for fire protection purposes is used without compensation as an incident of her townsite business.

The dominant characteristic of public use is that all of the public within reasonable range of the utility are beneficiaries.

Sufficient appears in the record to disclose that the Van Dyke subdivision is but one of four or more independent subdivisions constituting the settlement known as Miami (it is not a municipality) which has grown up with the development of the great copper mining industry at that point. As a geographical fact, of which the Court may take notice, the Prochaska (Live Oak) and Davis Canyon subdivisions are nearer the Van Dyke water plant than the Van Dyke subdivision. Recognition that the residents of the Live Oak and Davis Canyon subdivisions are not entitled to participate in the use of the Van Dyke water system, is, therefore, necessarily recognition that the latter is a private business and not a public utility.

Mrs. Van Dyke enjoys no franchise or privilege by grant from the State, express or implied.

If she has a valid water right by appropriation, as we contend, it is a private right, originating in grant from the United States, before the creation of the State, and not burdened with any obligation to devote to public use. In Palmer vs. Railroad Commission of

California, 138 Pac. 997, 1001 (approved by this court in San Joaquin Water Co. vs. Stanislaus County, supra), it was said:

> "Finally, on this point, the decisions in this State are to the same effect. Lux vs. Haggin we have already mentioned. The recent case of Thayer vs. California Development Co., 164 Cal. 125, 128 Pac. 21, states the rule to be that the right obtained by an appropriation under the Code is a private right; that the waters appropriated are not thereby appropriated to public use; and that they remain private property until the appropriator dedicates them to public use, which he may do or not at his own pleasure. The other cases holding this doctrine directly or in effect are cited in that case,"

and held that, as the water right in question vested before the constitutional amendment declaring all water or use of water to be the property of the people, it was not affected thereby.

The Arizona Constitution, Article XVII, Sec. 2, provided:

> "All existing rights to the use of any of the waters in the State for all useful or beneficial purposes are hereby recognized and confirmed."

The status and incidents of a water right such as claimed by Mrs. Van Dyke, were the same in Arizona as in California.

Furthermore, if Mrs. Van Dyke controls the water by virtue of a water right by appropriation, whatever may be the status thereof, the water, when pumped

into the storage tanks, is reduced to possession and becomes her personal property.

1 Wiel Water Rights in the Western States, 3rd ed., Secs. 33, 35, 690, and authorities cited.

If, on the other hand, Mrs. Van Dyke has not a water right by appropriation, but is pumping, storing and selling only diffused ground and percolating water, she is dealing with part of her real estate.

She has no monopoly, or even a virtual monopoly, as said in some of the cases. Monopoly in that sense is inseparable from dedication or devotion to public use, as pointed out by Justice McKenna in the Pipe Line Cases, *supra.*

A water right by appropriation is an exclusive right, but, as we have seen, it becomes private property, with regard to which the owner has the same rights as attach to any other private property.

If the water is diffused ground and percolating water, even the incident of exclusive control disappears, and with it any semblance of monopoly.

In either case, any of the property holders to whom Mrs. Van Dyke sells water could sink wells upon their own property. It is more advantageous and economical, however, for them to purchase water at the rates fixed by her.

It appears that others are or have been operating wells and furnishing water to adjoining properties. One Mackay operates a water system supplying a different section of Miami (affidavit of Geary, Record, p. 94). And one Prochaska, who subdivided forty acres as the Live Oak addition to Miami, established a water system but discontinued operating it when

he found he was pumping water at a loss of sixty dollars a month (affidavit of Cleve W. Van Dyke, Record, p. 90) and sought, through the Corporation Commission, to compel Mrs. Van Dyke to furnish water. The court below, however, enjoined the enforcement of the order of the Commission (Record, p. 104).

Mrs. Van Dyke, through superior foresight, judgment and enterprise, has acquired land and water having peculiar advantages. She has not consented to share those advantages with the public, but has elected to use them as an aid in the development of her townsite enterprise. It would be destructive of the sanctity of private property and liberty of contract to compel her to share those advantages with the purchasers of lots in her subdivision upon other than her own terms.

As a practical matter, the arrangement for water has been virtually a part of the contract of sale of lots in the Van Dyke subdivision. The lot purchasers bought with the understanding that they might purchase water from Mrs. Van Dyke's water system at the rates fixed by her; but, before service connection was permitted, they were required to sign written contracts to pay for the water the uniform rates fixed by her. As has been noticed, the Corporation Commission, by order No. 8 (Record, p. 40), undertook to annul those contracts, in the face of Sections 4 and 32 of Article II of the Arizona Constitution, supra, and the Federal Constitution.

If the rates could be reduced through exercise of the police power, the value of the lots would proportionately increase, even though slightly, and the re-

sult would be to take from Mrs. Van Dyke, as owner of the water system, and doubly give to the lot owners through decrease in rate and increase in lot value.

The status of Mrs. Van Dyke is comparable to that of the Uncle Sam Oil Company. She pumps, stores, and conveys in pipes on her own land, only water which is her private property, to points where she sells it. One difference, which does not affect the result, is that the Uncle Sam Oil Company, after pumping and conveying only its own oil, refines it before selling it; another, which favors her, is that instead of using rights of way for pipe lines, Mrs. Van Dyke's pipe lines are all on her own land.

We submit that it cannot be said that Mrs. Van Dyke's water business is "affected with a public interest" in any sense which would justify government rate fixing.

The decree below, in so far as it denied injunction restraining the defendants from enforcing the orders of the Corporation Commission, should be reversed and injunction directed to issue as prayed.

Respectfully submitted,

WILLIAM C. PRENTISS,
F. C. JACOBS,
Attorneys for Appellants.

APPENDIX.

Constitution of Arizona.

Article XIV.—Corporations other than Municipal.

Section 1. The term "corporation," as used in this article, shall be construed to include all associations and joint-stock companies having any powers or privileges of corporations not possessed by individuals or copartnerships, and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons.

Sec. 2. Corporations may be formed under general laws, but shall not be created by special acts. Laws relating to corporations may be altered, amended, or repealed at any time, and all corporations doing business in this State may, as to such business be regulated, limited and restrained by law.

Sec. 3. All existing charters under which a bona fide organization shall not have taken place and business commenced in good faith within six months from the time of the approval of this constitution shall thereafter have no validity.

Sec. 4. No corporation shall engage in any business other than that expressly authorized in its charter or by the law under which it may have been or may hereafter be organized.

Sec. 5. No corporation organized outside of the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law for similar corporations organized under the laws of this State; and no for-

eign corporation shall be permitted to transact business within this State unless said foreign corporation is by the laws of the country, State, or Territory under which it is formed permitted to transact a like business in such country, State, or Territory.

Sec. 6. No corporation shall issue stock, except to bona fide subscribers therefor or their assignees; nor shall any corporation issue any bond, or other obligation, for the payment of money, except for money or property received or for labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock of any corporation without the consent of the person or persons holding the larger amount in value of the stock of such corporation, nor without due notice of the proposed increase having been given as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.

Sec. 7. No corporation shall lease or alienate any franchise so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or of any of its privileges.

Sec. 8. No domestic or foreign corporation shall do any business in this State without having filed its articles of incorporation or a certified copy thereof with the corporation commission, and without having one or more known places of business and an authorized agent, or agents, in the State upon whom process may be served. Suit may be maintained against a foreign corporation in the country where an agent of such corporation may be found, or in the county

where the cause of action may arise.

Sec. 9. The right of exercising eminent domain shall never be so abridged or construed as to prevent the State from taking the property and the franchises of incorporated companies and subjecting them to public use the same as the property of individuals.

Sec. 10. In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as he shall be entitled to vote in said company under its charter multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more such candidates; and such directors or managers shall not be elected otherwise.

Sec. 11. The shareholders or stockholders of every banking or insurance corporation or association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares or stock.

Sec. 12. Any president, director, manager, cashier, or other officer of any banking institution who shall receive, or assent to the reception of, any deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances shall be individually responsible for such deposits.

Sec. 13. No persons acting as a corporation under

the laws of Arizona shall be permitted to set up, or rely upon, the want of a legal organization as a defense to any action which may be brought against them as a corporation, nor shall any person or persons who may be sued on a contract now or hereafter made with such corporation, or sued for any injury now or hereafter done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his or their defense.

Sec. 14. This article shall not be construed to deny the right of the legislative power to impose other conditions upon corporations than those herein contained.

Sec. 15. Monopolies and trusts shall never be allowed in this State, and no incorporated company, copartnership, or association of persons in this State shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders, or with any copartnership or association of persons, or, in any manner whatever, to fix the prices, limit the production, or regulate the transportation of any product or commodity. The legislature shall enact laws for the enforcement of this section by adequate penalties, and in the case of incorporated companies, if necessary for that purpose, may, as a penalty, declare a forfeiture of their franchises.

Sec. 16. The records, books, and files of all **public service corporations**, State banks, building and loan associations, trust, insurance, and guaranty companies shall be at all times liable and subject to the full visitorial and inquisitorial powers of the State, notwithstanding the immunities and privileges se-

cured in the declaration of rights of this constitution to persons, inhabitants, and citizens of this State.

Sec. 17. Provision shall be made by law for the payment of a fee to the State by every domestic corporation, upon the grant, amendment, or extension of its charter, and by every foreign corporation upon its obtaining a license to do business in this State; and also for the payment, by every domestic corporation and foreign corporation doing business in this State, or an annual registration fee of not less than $10, which fee shall be paid irrespective of any specific license or other tax imposed by law upon such company for the privilege of carrying on its business in this State, or upon its franchise or property; and for the making, by every such corporation, at the time of paying such fee, of such report to the corporation commission of the status, business, or condition of such corporation, as may be prescribed by law. **No foreign corporation shall have authority to do business in this State until it shall have obtained from the corporation commission a license to do business in the State,** upon such terms as may be prescribed by law. The legislature may relieve any purely charitable, social, fraternal, benevolent, or religious institution from the payment of such annual registration fee.

Sec. 18. It shall be unlawful for any corporation, organized or doing business in this State, to make any contribution of money or anything of value for the purpose of influencing any election or official action.

Sec. 19. Suitable penalties shall be prescribed by law for the violation of any of the provisions of this article.

Article XV.—The Corporation Commission.

Section 1. **A corporation commission is hereby created** to be composed of three persons, who shall be elected at the general election to be held under the provisions of the enabling act approved June 20, 1910, and whose term of office shall be coterminous with that of the governor of the State elected at the same time, and who shall maintain their chief office, and reside, at the State capital. At the first general State election held under this constitution at which a governor is voted for, three commissioners shall be elected who shall, from and after the first Monday in January next succeeding said election, hold office as follows:

The one receiving the highest number of votes shall serve six years, and the one receiving the second highest number of votes shall serve four years, and the one receiving the third highest number of votes shall serve two years. And one commissioner shall be elected every two years thereafter. In case of vacancy in said office, the governor shall appoint a commissioner to fill such vacancy. Such appointed commissioner shall fill such vacancy until a commissioner shall be elected at a general election as provided by law, and shall qualify. The qualifications of commissioners may be prescribed by law.

Sec. 2. All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cool-

ing purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers shall be deemed public-service corporations.

Sec. 3. The **corporation commission** shall have full power to and shall prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by **public-service corporations** within the State for service rendered therein, and make reasonable rules, regulations, and orders by which such corporations shall be governed in the transaction of business within the State, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such **corporations** in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health of the employees and patrons of such **corporations**: **Provided,** That incorporated cities and towns may be authorized by law to exercise supervision over **public-service corporations** doing business therein, including the regulation of rates and charges to be made and collected by such corporations: **Provided further**, That classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said **corporation commission** may from time to time be amended or repealed by such commission.

Sec. 4. The **corporation commission** and the several members thereof shall have power to inspect and investigate the property, books, papers, business methods, and affairs of any corporation whose stock shall

be offered for sale to the public **and of any public-service corporation doing business within the State,** and for the purpose of the commission and of the several members thereof shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the State. Said commission shall have power to take testimony under commission or deposition either within or without the State.

Sec. 5. The corporation commission shall have the sole power to issue certificates of incorporation to companies organizing under the laws of this State, and to issue licenses to foreign corporations to do business in this State, as may be prescribed by law.

Sec. 6. The lawmaking power may enlarge the powers and extend the duties of the corporation commission, and may prescribe rules and regulations to govern proceedings instituted by and before it; but until such rules and regulations are provided by law, the commission may make rules and regulations to govern such proceedings.

Sec. 7. Every public-service corporation organized or authorized under the laws of the State to do any transportation or transmission business within the State shall have the right to construct and operate lines connecting any points within the State and to connect at the State boundaries with like lines; and every such corporation shall have the right with any of its lines to cross, intersect, or connect with any lines of any other public-service corporation.

Sec. 8. Every public-service corporation doing a

transportation business within the State shall receive and transport, without delay or discrimination, cars loaded or empty, property, or passengers delivered to it by any other public-service corporation doing a similar business, and deliver cars, loaded or empty, without delay or discrimination, to other transportation corporations under such regulations as shall be prescribed by the corporation commission or by law.

Sec. 9. Every public-service corporation engaged in the business of transmitting messages for profit shall receive and transmit, without delay or discrimination, any messages delivered to it by any other public-service corporation engaged in the business of transmitting messages for profit, and shall with its lines make physical connection with the lines of any public-service corporation engaged in the business of transmitting messages for profit under such rules and regulations as shall be prescribed by the corporation commission or by law: **Provided,** That such public-service corporations shall deliver messages to other such corporations, without delay or discrimination, under such rules and regulations as shall be prescribed by the corporation commission or by law.

Sec. 10. Railways heretofore constructed, or that may hereafter be constructed, in this State are hereby declared public highways, and all railroad, car, express, electric, transmission, telegraph, telephone, or pipe line corporations for the transportation of persons or of electricity, messages, water, oil, or other property for profit are declared to be common carriers and subject to control by law.

Sec. 11. The rolling stock and all other movable property belonging to any public-service corporation

in this State shall be considered personal property, and its real and personal property, and every part thereof, shall be liable to attachment, execution, and sale in the same manner as the property of individuals; and the lawmaking power shall enact no laws exempting any such property from attachment, execution, or sale.

Sec. 12. All charges made for service rendered or to be rendered by public-service corporations within this State shall be just and reasonable, and no discrimination in charges, service, or facilities shall be made between persons or places for rendering a like and contemporaneous service, except that the granting of free or reduced rate transportation may be authorized by law, or by the corporation commission, to the classes of persons described in the act of Congress approved February 11, 1887, entitled "An act to regulate commerce," and the amendments thereto, as those to whom free or reduced rate transportation may be granted.

Sec. 13. All public-service corporations and corporations whose stock shall be offered for sale to the public shall make such reports to the corporation commission, under oath, and provide such information concerning their acts and operations as may be required by law or by the corporation commission.

Sec. 14. The corporation commission shall, to aid it in the proper discharge of its duties, ascertain the fair value of the property within the State of every public-service corporation doing business therein; and every public-service corporation doing business within the State shall furnish to the commission all evidence in its possession, and all assistance in its

power, requested by the commission in aid of the determination of the value of the property within the State of such public-service corporation.

Sec. 15. No public-service corporation in existence at the time of the admission of this State into the Union shall have the benefit of any future legislation except on condition of complete acceptance of all provisions of this constitution applicable to public-service corporations.

Sec. 16. If any public-service corporation shall violate any of the rules, regulations, orders, or decisions of the corporation commission such corporation shall forfeit and pay to the State not less than $100 nor more than $5,000 for each such violation, to be recovered before any court of competent jurisdiction.

Sec. 17. Nothing herein shall be construed as denying to public service corporations the right of appeal to the courts of the State from the rules, regulations, orders, or decrees fixed by the corporation commission, but the rules, regulations, orders, or decree so fixed shall remain in force pending the decision of the courts.

Sec. 18. Until otherwise provided by law, each commissioner shall receive a salary of $3,000 a year, together with his actual necessary expenses when away from home in the discharge of the duties of his office.

Sec. 19. The corporation commission shall have the power and authority to enforce its rules, regulations, and orders by the imposition of such fines as it may deem just, within the limitations prescribed in section 16 of this article.